Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

Cynthia A. Schultz
Petitioner

v.

Charles J. Sykes, Journal Broadcast Group, Inc.
and Journal Sentinel, Inc.

On Petition For Writ of Certiorari
To The Wisconsin Supreme Court

PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Under his "inherent powers," a Wisconsin trial judge, in the instant defamation civil case, conducted a four day criminal proceeding, in which the respondents were the prosecutors and that involved elaborate fact finding, to determine if Ms. Schultz attempted to commit the crime of subornation of perjury in a two year old immaterial criminal case and in the instant civil case. Upon finding that Ms. Schultz had "committed" attempted subornation of perjury and upon finding that there was no fraud on the court and "no prejudice" or "harm" caused to the instant case or to the Journal, the trial court invoked his "inherent powers" to "penalize" Ms. Schultz , to "deter future misconduct" and to "maintain (the court's) integrity." As punishment, the trial court took Ms. Schultz's and ALI's undefeated and affected defamation claims, that the Journal valued in the "multiple-millions of dollars" and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict," and gave those claims to the Journal - the prosecutors. At the close of the proceeding, the Journal prosecutors moved the court to award them attorney fees for prosecuting Ms. Schultz for attempted subornation of perjury, for prosecuting the motion to get their fees under §814.025 *Wis. Stat*. (the equivalent to the American Rule) and for fees to collect the anticipated judgment. Judge Wasielewski found that he could not award fees, according to statute, because no part of the case was frivolous or prejudiced and that there was no harm caused to the case or to the Journal. Thus, again, he invoked his "inherent powers" to impose, on top of the drastic sanction of dismissal, an escalating unconditional fine, not calibrated to damages, made payable to the Journal for their attorney fees, from August 24, 1999 up to the appeal to "penalize" Ms. Schultz and to "deter future misconduct." The trial court found that, although there were no actual losses sustained and that "no actual prejudice

occurred," the absence of damages would "not lie as a defense" because Ms. Schultz was being punished for "conduct which goes to the heart of our system. As a result, Ms. Schultz and the Animal Lobby, Inc. were made to be jointly and severally liable to the Journal in the amount of $168,944.97 for the Journal fees that included all of the Journal's costs for the entire case and legal fees from August 24, 1999 to March 27, 2000. In addition to the purely punitive sanction of dismissal and the award of attorney fees to the Journal for serving as prosecutor in the criminal proceeding and for litigating to get their fees for serving as prosecutor, Judge Wasielewski again invoked his "inherent powers" to make the Animal Lobby and Ms. Schultz liable for the Journal attorney fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken" as punishment for Ms. Schultz and the Animal Lobby exercising their statutory right to appeal his decisions. Ms. Schultz and ALI appealed to the Wisconsin Court of Appeals on the grounds that the trial court violated her 5th, 6th and 14th Amendment due process rights by conducting a criminal proceeding and finding Ms. Schultz guilty of a crime without providing her with notice, a jury, an independent prosecutor and the beyond a reason doubt standard of proof, that the trial court violated the 8th Amendment's cruel and unusual punishments clause by imposing sanctions that were grossly excessive and for the benefit of the interested Journal who served as the prosecutor in the criminal proceeding; and that Judge Wasielewski violated Ms. Schultz's 14th Amendment due process rights by failing to act as an impartial and unbiased magistrate. The court of appeals upheld all of Judge Wasielewski's sanctions concluding that the "severe" and "drastic" sanctions did not have to be calibrated to damages "because the court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed" [Pet:17] and that Judge Wasliewski could impose sanctions, not calibrated to damages, to "maintain his dignity" in both

this civil case an in another criminal case. [Pet:11,15,16] The appeals court also held that Ms. Schultz's due process rights were not violated because the sanctions were "so severe" and the allegation of misconduct was "so serious," due process required no more than an "evidentiary hearing" in which guilt needed not be established beyond a reasonable doubt because "no criminal complaint issued, no loss of liberty was at stake, and no criminal jeopardy attached." The court of appeals, however, could not find a reason why Judge Wasielewski entered a $168,944.97 judgment against the Animal Lobby, Inc. and took their valuable cause of action. Therefore, they remanded the Animal Lobby's claims to have the trial court impute Ms. Schultz's guilt on to them after they re-dismissed one of the Animal Lobby's claims by making an erroneous finding of fact. Ms. Schultz and ALI petitioned for review with the Wisconsin Supreme Court. The Wisconsin Supreme Court denied the review.

QUESTIONS PRESENTED

Were Ms. Schultz's constitutional rights to a jury trial, under U.S. Const. Art. III, Sec. 2 and the 6th Amendment, violated when the civil trial judge, in the instant defamation case, invoked his "inherent powers" to conduct an elaborate fact finding proceeding to determine if Ms. Schultz was guilty of an attempt to suborn perjury from a party who was immaterial and not proffered to the court as a witness?

Were Ms. Schultz's due process rights violated when the Journal lawyers served as the prosecutors in the proceeding that was intended to establish Ms. Schultz's guilt of a crime and to penalize her with the taking of an undefeated and unprejudiced civil defamation action?

Was it a violation of Ms. Schultz's constitutional rights for the trial court to invoke its "inherent powers" to "penalize" Ms.

Schultz for criminal conduct it found happened in front of another tribunal?

Was it a violation of the Fifth Amendment for the trial court, without the procedural protections of a criminal trial, to take Ms. Schultz's cause of action, that the court concluded was not prejudiced and that "ought to have been heard by a jury," and give that cause of action to the Journal to "penalize" Ms. Schultz and to "maintain the court's dignity"?

Was it a violation of the Fifth Amendment for the trial court to invoke his "inherent powers" to deprive Ms. Schultz of her inviolate right to a civil jury trial, guaranteed by *Wisconsin Constitution, art. I, § 5*, to penalize her for attempted subornation of perjury?

Were Ms. Schultz's constitutional rights violated when the trial court invoked his "inherent powers" to punish her for exercising her statutory right to appeal with the sanctions of Journal fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken?

Does a state trial court have the "inherent power" or jurisdiction to award attorney fees for an appeal to this Court?

Was it a violation of Ms. Schultz's procedural due process rights to have the burden of proof standard decided by the Journal after the criminal proceeding in which they were the prosecutors?

Did the court of appeals violate Ms. Schultz's due process rights by making prejudicial erroneous findings of facts that were contrary to the trial court record?

Did the trial court violate Ms. Schultz's constitutional rights when he based an increase in his punishment of her on her refusal to admit to a pre-litigation subornation of perjury in another case?

Was it a violation of Ms. Schultz's constitutional rights when the trial court invoked his "inherent powers" to punish Ms. Schultz with an award of Journal attorney fees that were not calibrated to damages and that were to prosecute her and their motion to dismiss the case?

Did the court of appeals deprive Ms. Schultz of her statutory right to appeal the nature of the proceedings in the trial court by ignoring Ms. Schultz's challenges to the proceedings as being criminal in nature and by ignoring her challenges to the sanctions as being grossly excessive and in violation of the 8th Amendment?

What is the standard of review of a trial court's ruling on a challenge to the constitutionality of a sanction proceeding conducted under the trial court's "inherent authority?"

Did the sanctions in this case violate the cruel and unusual punishment clause of the 8th Amendment?

PARTIES TO THE PROCEEDING

Cynthia A. Schultz is the Petitioner.

Charles J. Sykes, Journal Broadcast Group, Inc. and Journal Sentinel, Inc., are the Respondents.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Cynthia A. Schultz, respectfully prays that a writ of certiorari issue to review the decision of the Wisconsin Court of Appeals, District 4, dated October 4, 2001 (published) and the denial of the Petition for Review thereof by the Wisconsin Supreme Court dated January 29, 2002.

OPINIONS BELOW

The decision of the Wisconsin Supreme Court dates January 29, 2002 denying the Petition for Review is reprinted at Pet: 1-2 of the Appendix to this Petition. The opinion of the Wisconsin Court of Appeals, District 4 dated October 4, 2001 is reprinted at Pet:8-36 of the Appendix to the Petition.

JURISDICTION

The Wisconsin Supreme Court on January 29, 2002 issued its Order denying the Petition for Review and thereby affirming the decision of the Wisconsin Court of Appeals, District 4 entered on October 4, 2001. The jurisdiction of the United States Supreme Court to review the decision of the Wisconsin Supreme Court is found at 28 U.S.C. § 1257 (a).

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CONSTITUTIONAL PROVISIONS AT ISSUE

Article III, Section 2 of the United States Constitution provides, in relevant part: "trial of all crimes...shall be by jury..." U.S. Const. Art. III, Sec. 2

The Fifth Amendment provides, in relevant part: "No person shall be held to answer for an...infamous crime, unless on a presentment or indictment of a grand jury...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb...nor be deprived of life, liberty, or property, without due process of law...."

The Sixth Amendment provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury...to be informed of the nature and cause of the accusation...to be confronted with the witnesses against him..."

The Eighth Amendment provides, in relevant part: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment provides, in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Ms. Schultz is a political consultant who has run many campaigns for candidates for the U. S. Senate and for Wisconsin's appellate and supreme courts. In addition, Ms. Schultz founded two non-profit animal protection organizations – the Animal Lobby, Inc. and the Wisconsin Society for the Prevention of Cruelty to Animals, Inc.[1]

The Milwaukee Journal Sentinel is Wisconsin's major newspaper and the only daily in Milwaukee. Journal Broadcast Group, Inc. owns WTMJ Radio which broadcasts throughout Wisconsin. Charlie Sykes, the spouse of former Journal reporter and present Wisconsin Supreme Court Justice Diane Sykes, hosts a WTMJ talk show. Journal Sentinel, Journal Broadcast Group and WTMJ Radio are all owned by Journal Communications, Inc.[2]

In January of 1996, Ms. Schultz, while working for appellate court Judge Ralph Adam Fine, stung the Journal Sentinel by publicly questioning the Journal's ethics of giving valuable free pre-election endorsement advertising to the judicial candidates deciding the many Journal cases. Consequently, the Journal had to publish an embarrassing apology for not informing its readers of a conflict of interest that it had with a judicial candidate. [217] At this same time, two sickly dogs were living outside in sub-zero temperatures without food, water and shelter. When police ignored the Humane Officer's finding that the dog owners had violated §951.13(1) Wis. Stat. [Pet:100][A:AP:310-317], the dogs were taken from their yard and Ms. Schultz's recent contacts with neighbors and others made her a suspect in aiding in the rescue. The dognapping was not a police priority until the Journal began a series of

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[1]We will refer to the Wisconsin Society for the Prevention of Cruelty to Animals, Inc. as the WSPCA and the Animal Lobby, Inc. as ALI.

[2]We will refer to Sykes, Journal Broadcast Group and the Journal Sentinel as the Journal unless otherwise noted.

front page stories reporting that Ms. Schultz had victimized the dogs' owners by stealing their healthy dogs, who authorities found were "not mistreated," because she and "animal rights vigilantes," who once had a dog "killed and carved up to get publicity," thought it was "cruel" to keep animals outside. [A-AP:282-296] Charlie Sykes and WTMJ Radio pressed authorities to prosecute Ms. Schultz and attacked Judge Fine for lacking the integrity and good judgment to fire her. In at least 12 radio broadcasts, Sykes reported that Ms. Schultz had "lied" about filing a campaign finance report, had "committed a felony," had conducted a year long "campaign of harassment" against the owners of the "well cared for dogs" who he claimed she took and put in harms way much like she and ALI had done when "they had a dog killed and carved up to prove a political point and to get publicity." [A-AP:203-281] While it was true that Ms. Schultz was suspected of being a party to the misdemeanor dognapping of two malnourished dogs, the aforementioned collateral reporting was false and it was that collateral reporting that constituted the defamations in this action.

The Journal ultimately goaded the District Attorney into referring the misdemeanor to a special prosecutor in a distant county. On May 21, 1996, Ms. Schultz was charged with being a party to the misdemeanor of dognapping, *§951.03 Wis. Stat.*, [Pet:101] The Journal continued to pressure authorities to pursue Ms. Schultz [131:Ex.13:89] until December of 1997 when the special prosecutor dismissed the charges saying that it would be a violation of the state's "ethical obligation" to proceed to trial when the "State's case in chief significantly fails to establish proof beyond a reasonable doubt." [A-AP:318-19] Neither the Journal Sentinel nor Sykes, the only media reporting on the dognapping, reported the dismissal.

Before charges were filed, Ms. Schultz and ALI notified WTMJ of a potential defamation action and requested that the tapes of the slanderous broadcasts be preserved and provided pursuant to *47 C.F.R. §§ 73.1920*.[Pet:102][A-AP:325-26] WTMJ provided some tapes but destroyed others. [A-AP:327] Ms.

Schultz and ALI also notified the Journal Sentinel of the defamations pursuant to §895.05(2) Wis. Stat.[Pet:104].[3] The Journal Sentinel ignored the notices and repeated the libels [A-AP:320-24;332-37].

On January 28, 1998, Ms. Schultz and ALI filed this defamation action [2]. In June, the court ruled that both were "limited purpose" public figures and that they had to prove actual malice [A-AP:193-202]. Ms. Schultz conceded that the misdemeanor charge prevented her from proving that Sykes acted with actual malice when he repeatedly reported that she had committed a felony [24]. While the court found many of the Sykes' slanders, surrounding the dognapping, "troubling" and considered it a "close[r] call" as to whether actual malice could be proved even with the dognapping charges and Ms. Schultz's acknowledgment of "being involved in the post theft" of the dogs [Pet:44-46], he granted summary judgment on all but two counts of defamation where Sykes and the Journal falsely reported that Ms. Schultz and ALI had a dog killed and butchered to get publicity and to prove a political point. [Pet:50-52]. In June of 1999, right before the jury trial, a new judge, Francis Wasielewski, rotated onto the case. The Journal immediately filed a second summary judgment motion, that was identical to the first denied a year earlier by a different trial judge [85], claiming again that, because Ms. Schultz was involved in dognapping two abused dogs, she could not have been defamed by the Journal's false reports that she had a dog killed and carved up to get publicity. While Judge Wasielewski was deciding this second summary judgment motion, the Journal filed another motion asking him to use his "inherent power" to dismiss the dog killing defamation claims because the Journal had evidence proving that Ms. Schultz was guilty of the dognapping [98].

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[3]The court of appeals re-dismissed ALI's claim against the Journal Sentinel, after re-instating and remanding ALI's claims, by making an erroneous factual finding that ALI did not send the mandatory notice that was sent and in the appendix of ALI's appellate court brief. [Pet:35-36]

Supporting the Journal motion to dismiss, was the affidavit and deposition testimony of five time convicted felon, Clary Engel. Ms. Schultz met Engel in late 1995 when the WSPCA responded to a televised plea for money to fix Engel's dog's leg. The WSPCA paid a vet to perform surgeries on the dog but stopped funding the dog's after care when Engel attempted to persuade the vet to give him the money that the WSPCA paid to the vet to help his dog [A:AP:463]. Engel dumped his dog but admitted that he continued to "watch the Journal to see what was coming up next" on Ms. Schultz [197:82-83]. Engel was listed as a possible witness in the dismissed criminal dognapping case after he told Ms. Schultz's attorney that he over heard her telephone conversations on the day of the dognapping. As her attorneys confirmed she did with all of her witnesses in the dognapping case, Ms. Schultz interviewed Engel, made notes of what he told her and gave those notes to her attorney and to Engel. [B:AP:1059,1063][4] In August of 1998, Engel and Ms. Schultz's defamation lawyer went back and forth about signing an affidavit to memorialize a conversation he had with the same lawyer.[5] Engel never kept an appointment to finalize the affidavit and the issue was dropped. [B:AP:1001] On September 24, 1998, the day that the Journal Sentinel publicized that this defamation case was

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[4]Judge Wasielewski later found that these notes were an attempt to suborn Engel's perjury in the criminal dognapping case. The court of appeals held that *Chambers v. Nasco, Inc.*, 501 U.S. 32, 57 (1991) authorized the court's use of his "inherent power" to sanction conduct in front of another tribunal [Pet:18] and relied on these notes, drafted for Ms. Schultz's attorneys in the old dognapping case, to uphold sanctions, in the instant case, for conduct that Judge Wasielewski found was "fraudulent" in the old criminal case.[Pet:28]

[5]Engel testified that he never had the conversation [Pet:426-27]. Telephone records proved that he called Ms. Schultz's lawyer and had a lengthy conversation. Judge Wasielewski didn't believe Engel's testimony that he didn't have the conversation [Pet:64] but believed Engel's testimony that the attempt to set out the conversation in an affidavit, that Ms. Schultz never saw and that Engel never signed, was really an attempt to suborn his perjury. Thus, this was the second attempt to suborn Engel's perjury that Judge Wasielewski later found.

going
to trial, Engel called Ms. Schultz asking if he would be a witness in the defamation case [A-AP:296; 216:Ex.101-10]. Ms. Schultz told him that he would *not* be a witness in the civil case as Engel later testified [130:Ex.8:50-51]. A year later, in August of 1999, a Journal subpoena to depose Engel set off a flurry of calls from him. He first called Ms. Schultz and intimated that he should get something to testify at the deposition if he was going to get "crossways with a judge [Charlie Syke's wife]." [200:125][198:91-92]. When Ms. Schultz didn't bite, he next called Sykes and the Journal Sentinel to get money from them [A-AP:394]. After getting no response from Ms. Schultz and after getting himself in deep with the Journal,[6] Engel, who was on probation for a burglary and felony firearm conviction, next called his friend, Assistant U. S. Attorney Joe Wall. He told Wall that he had saved the "talking points" that Ms. Schultz had given to him and to her attorney two years earlier in the criminal dognapping case thus proving that Ms. Schultz had tried to suborn his perjury in that case [200:86]. Wall, who was running for Circuit Court Judge and looking for the valuable free Journal advertising and money from the lawyers in the large Journal firm,[7] escorted Engel to a meeting with the Journal lawyers where the Journal made the deliberate decision to incur extra costs by suppressing Engel's disclosures from the independent scrutiny of law enforcement and from Ms. Schultz [B:AP:1021-22]. A Journal lawyer testified: "I did not believe that to report it to the police or the District Attorney at the time was in the best

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[6]The court of appeals found Engel's extortion attempts to be only "troubling." [Pet:27] The court of appeals, however, did not have the benefit of yet to be discovered evidence that has only recently brought into question the propriety of a Journal lawyer's involvement in a delivery of a cash payment to one of Engel's creditors. [Pet:457-61]

[7]After Wall's help, the Journal gave Wall free advertising by promoting him on WTMJ and in the Journal Sentinel's free pre-election endorsement advertisement. The Journal lawyers and Judge Wasielewski also helped Wall, a Journal witness, by publicly endorsing and soliciting money for him. [Pet:301,Ex:C]

interest of my client....and that *no harm* would be done by the delay, but that my clients' interest were best served by my doing what we did." [210:52] During the Journal meeting, Engel agreed to tape Ms. Schultz to get evidence to support his claims and to postpone his following day's deposition to give the Journal more time to wangle with his testimony [Pet:388-91]. After the meeting, the Journal engaged in a series of ruses that prevented Ms. Schultz from halting any further tampering with the testimony of this multiple convicted felon who had already asked both the Journal and Ms. Schultz for money [200:87,91-94]. They first called Ms. Schultz's lawyer and pretended that Engel had called to postpone the following day's deposition after he "had to go to the hospital" upon finding his girlfriend "inside the ambulance" [A:AP:535] [126:14] [210:45-47]. During the eight days between the postponed deposition and the rescheduled deposition, Engel refused to tape record a conversation with Ms. Schultz and met again with Journal lawyers to orchestrate the testimony he would give on camera in the new deposition [A:AP:536]. On the day before his new deposition and immediately after another meeting with Journal lawyers, Engel made multiple unprovoked calls to Ms. Schultz [A:AP:417-423]. When he finally reached her on the morning of his deposition, Engel tried to extort $2000.00 from her to keep him from putting on a "big performance"[202:116-117]. Ms. Schultz convinced Engel to meet her at her lawyer's office before the deposition. Engel agreed and was waiting for Ms. Schultz when she arrived at her lawyer's office but would not go inside. Instead, he first asked her for money again and then backed off blaming his erratic behavior on his financial problems [202:120-121]. Having put Ms. Schultz in the position of either turning Engel in for extortion or believing that his bizarre behavior was the result of his financial problems, Engel proceeded to the Journal lawyers' office where he waited in their private offices for his deposition [A-AP:431, 211:15]. Engel never told the Journal lawyers that he had made multiple calls to Ms. Schultz, that he met her at her lawyer's office that morning or that he asked her for money. [98:95-96]

At the deposition, Engel testified that he was "surprised" to receive the Journal subpoena because Ms. Schultz had told him that he would not be a witness in the civil case [130:Ex.8:50-51] and he furthered the Journal ambulance ruse by lying about postponing his deposition after finding his girlfriend in an ambulance [A:AP:535-536]. Likewise, Engel lied to conceal his calls to get money from the Journal and Sykes [A:AP:544-545]. Sometime later, Engel gave the Journal a version of events of the morning of his deposition [A-AP:496]. That version was set down in a September 13th Journal affidavit in which Engel testified that Ms. Schultz had *called him* on the morning of his deposition to get him to meet her so that she could suborn his perjury again by giving him a "script" that he could not produce [B-AP:974-979].[8] On September 27th, the Journal received telephone records, subpoenaed by Ms. Schultz, proving that Ms. Schultz did not call Engel but that Engel had called her [216:ex:108]. Immediately, the Journal had Engel sign a new affidavit that edited out Engel's lie about Ms. Schultz calling him but that still contained the lie that Engel did not tell the Journal of his meeting with Ms. Schultz because "he got to the offices of Foley and Lardner at 2:35 P.M., late for his deposition" [98:95-96]. This false affidavit and false deposition testimony were proffered to the court in support of the Journal motion to dismiss that also concealed Engel's attempts to get money from them, his refusal to get taped evidence of his claims and his attempts to lie in the attached Journal affidavit [97]. Ms. Schultz denied the Journal accusations and objected to a hearing and to the dismissal [101]. Judge Wasielewski ordered an "evidentiary hearing" on the Motion to Dismiss and denied the Journal's second motion for summary judgment finding that, being that he was the "fourth judicial officer to take a look at this," he too

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[8]Judge Wasielewski found that this was the third attempt, by Ms. Schultz, to suborn Engel's perjury.

believed that actual malice could be proved [Pet:54][9].

During the weeks leading to the proceeding, the Journal spent tens of thousands of dollars on calls, prep sessions and on a five hour mock trial [B:AP:970-1000] to further spoil the testimony of Engel who, after asking them for money, had already lied to help the Journal in both his deposition and in two affidavits. On January 10, 2000, over Ms. Schultz's repeated objections that Judge Wasielewski and the Journal were "turning this hearing into a criminal trial" on the dognapping "that doesn't involve anything that is involved in this civil lawsuit at this present time"[1400:42] [197:25], the court embarked on four days of elaborate fact finding to determine whether Ms. Schultz was guilty of the 1996 dognapping, of attempting to suborn Engel's perjury in the 1996 dognapping case and of attempting to suborn Engel's perjury for an affidavit and for his deposition in the civil case. The proceeding began as a "preliminary evidentiary hearing" under §901.04 *Wis. Stat*. [Pet:106-08]. As it progressed, Judge Wasielewski repeatedly called the proceeding a "trial on the issue of suborning perjury"[Pet:81] in what he referred to as being a "suborning perjury case" [208:31] and selectively and confusingly applied the criminal rules of evidence that are applicable to a criminal jury trial.[10] While the "preliminary

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[9]The court of appeals reasoned that Judge Wasielewski's repeat of the decision of three other judicial officers to deny the Journal motion for summary judgment, demonstrated that he was not trying to end run a jury when "it would have been much easier for the circuit court to simply deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations to the district attorney's office" [Pet:21]

[10] §901.04(1) *Wis. Stat*. [Pet:106] provides that the rules of evidence are relaxed in evidentiary hearings where trial courts are not bound by them. The court of appeals, however, relied solely on case authority, appropriate only to criminal jury trials, to uphold Judge Wasielewski's selective application of the criminal rules of evidence in the proceeding that was supposed to be an "evidentiary hearing." The court of appeals also based their decision on their erroneous conclusion that because Engel had been truthful about the number of times he was convicted of a crime "no further

evidentiary hearing"was to determine the admissibility of evidence, Judge Wasielewski conducted a separate "evidentiary hearing" to decide what evidence could be brought into the "evidentiary hearing" and, at the Journal's request, sealed Clary Engel's public criminal records in violation of §19.35 Wis. Stat. [Pet:109][A-AP:358-62] After days of confusing and elaborate fact finding on the same dognapping evidence put forth in both Journal motions for summary judgment, Judge Wasielewski concluded that his "inherent powers" authorized him to deprive Ms. Schultz and ALI of their state constitutional and statutory rights to a jury trial in their civil case[11] based on whether "we believe Clary Engel or do we believe Cynthia Schultz" on whether Ms. Schultz "committed perjury" and "suborned perjury" [Pet:60,389]. Ms. Schultz instructed Judge Wasielewski that the criminal nature of his decision required that a jury establish her guilt "beyond a reasonable doubt"[Pet:390-92]. Judge Wasielewski did "not think suborning perjury is a crime" and, for the first time, established that he would use the middle burden of proof after the Journal told him what burden they thought they had met [Pet:395].[12] Ms. Schultz also again demanded a jury "under the Constitution of Wisconsin and the Constitution of the United States" [Pet:396]. Judge Wasielewski, however, "deem[ed] that a jury ha[d] been

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inquiry was permissible" [Pet:24]. Ms. Schultz's brief to the court of appeals clearly pointed out the instances, in the record [Pet:249,264], where Engel repeatedly lied about the number of times he was convicted of a crime [Pet:428-36] and the court of appeals recognized that fact when it contradicted itself later in its own opinion. [Pet:26].

[11]The *Wisconsin Constitution, art. I, § 5* [Pet:116] and *§ 805.01(1), Wis. Stat.*, [Pet:117-18] guarantee the inviolate right to a jury trial to one who has paid the jury fee as Ms. Schultz and ALI timely did in this case [B-AP: 968-69].

[12]Perjury is a class D felony [*§ 946.31, Wis. Stats.*][Pet:118]. Solicitation a class D felony [*§§ 939.30 and 939.31, Wis. Stats.*] [Pet:119-20] The penalty for an attempt is one-half the completed crime. [*§ 939.32 Wis. Stats.*][Pet:121]

waived" because Ms. Schultz participated in the court ordered proceeding[Pet:396-97]. Also, for the first time, Judge Wasielewski informed Ms. Schultz that, because "credibility has been at the very bottom of this whole thing," summary judgment methodology did not apply [Pet:396].[13] Ultimately, Judge Wasielewski concluded that Ms. Schultz had attempted to suborn Engel's perjury by giving Engel the notes in the 1996 dognapping case that never went to trial, in an affidavit in the civil case that Ms. Schultz never saw and that Engel never signed to memorialize a conversation with Ms. Schultz's lawyer that Engel testified he never had but that Judge Wasielewski found he did have and by giving Engel a script of perjured testimony, on the day of his deposition, that he could not produce. Judge Wasielewski further concluded that, although the alleged attempts to suborn perjury caused "no prejudice" to the case or to the Journal [Pet:71],[14] his "inherent powers" authorized him to "penalize" Ms. Schultz to "deter future misconduct" [Pet:70,80] and to "maintain [the court's] integrity" [Pet:72].

Without any restraint on his use of his "inherent power" without any attempt to isolate out the punishment for the alleged pre-litigation subornation of perjury that he found occurred in another criminal case, Judge Wasielewski took Ms. Schultz's and ALI's valid causes of action that the Journal valued in the "multiple-millions of dollars" [208:45, 212:101-03,210:64] and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict" [Pet:93], and gave those causes of action to the Journal – the prosecutor.

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[13]When Ms. Schultz objected to not having noticeof the standards being used to conduct the proceeding, Judge Wasielewski smugly replied: "You never asked." [Pet:400]

[14]The court of appeals found "whether the Journal was prejudiced is also not a factor that the circuit court was required to consider. The court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed." [Pet:17]

After Judge Wasielewski imposed the first drastic punishment of dismissal without rendering findings of fact or conclusions of law at the Journal suggestion that such findings would only be "gilding the lily" [Pet:72], the Journal moved the court to find the case frivolous and to award them $470,000.00 in fees, under *§ 814.025, Wis. Stat.*[Pet:72,123] Ms. Schultz moved for reconsideration on the grounds that her procedural due process rights were violated by the "mini-trial guised as an evidentiary hearing:"

> "The mini-trial, conducted in this case, deprived Ms. Schultz of her constitutional rights to a trial by jury. No charges were brought. No complaint was issued. All of the constitutional and legal protections afforded to a defendant, which was just what Ms. Schultz was in this mini-trial, were ignored." [126:9]

Ms. Schultz also asked that the Journal be sanctioned, under *§802.05 Wis. Stat.*,[Pet:125] for wilfully proffering Engel's false affidavit and deposition testimony to the court [126:35]. Judge Wasielewski denied the motion and request for sanctions "out of hand" [207:2] and, under his "inherent powers," issued an injunction preventing Ms. Schultz and ALI from spending any of their assets [206:17-38,167]. Ms. Schultz petitioned the court of appeals to exercise supervisory jurisdiction to restrain Judge Wasieliewski's use of his inherent powers by stopping him from exacting more punishment and to determine if the "due process and equal protection clauses of the respective Constitutions [had] been flagrantly offended"[Pet:402-13]. The petition was denied six days later by a panel of three appellate court judges from both the 1st and 4th District courts of appeals[15] [164; 208:2-3].

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[15]Although the District I court of appeals had jurisdiction over the appeal, the withdrawal of District I judges Fine and Schudson necessitated the inclusion of District III Judge Cane as the third judge on the panel. Judge Cane withdrew, without reason, after making one decision, and District IV Judge Vergeront became the third judge on the panel with District I Judges

After again finding that no part of the case was impacted by or made frivolous by anything that came out of the proceeding, Judge Wasielewski determined that fees and costs could not be awarded to the Journal under §814.025 Wis. Stat. [Pet:78, 123] As part of his reasoning, Judge Wasielewski determined that there was no harm caused because, even if Engel would have been proffered to the court as a witness, he would have been an unimportant witness being that Ms. Schultz "did not intend to rely on Mr. Engel" as a witness [Pet:77].[16] Judge Wasielewski also decided that, although the alleged attempt to suborn perjury was "evidence of consciousness of guilt," he could not establish Ms. Schultz's "guilt with respect to the dognapping" and referred the dognapping case to the District Attorney who declined to prosecute [Pet:77-80]. Nonetheless, upon deciding again that there were no actual losses sustained and that "no actual prejudice occurred," Judge Wasielewski concluded that the absence of damages would "not lie as a defense" because Ms. Schultz was being "penalized" for "conduct which goes to the heart of our system" [Pet:81] and again used his "inherent powers" to impose, on top of the drastic sanction of dismissal, an escalating unconditional fine that covered the Journal's attorney fees[17] from August 24, 1999, the day the Journal claimed they first met Engel, for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken"[Pet:83-85].[18] Next, Judge Wasielewski

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Wedemeyer and Curley. Therefore, Judge Wedemeyer, Curley and Vergeront made this decision.

[16]The court of appeals misstated these facts in the record when it said that it "believed with good reason" that "the circuit court did not accept Schultz's assertion that Engel was an unimportant witness..." [Pet:17]

[17]Wisconsin adheres to the "American Rule." Watkins v. LIRC, 117 Wis.2d 753, 758 (1984) and does not recognize the bad faith exception to the American Rule. Arneson v. Continental Insurance Company, 158 Wis. 2d 728, ***12 (1990), unpublished opinion.

[18]§ 808.03(1), Wis. Stat., provides a statutory right to appeal. [Pet:128]

conducted a hearing to determine if the Journal's attorney fees, not measured to damages, were reasonable under *Wis. Supreme Court rule 20:1.5(a)* [Pet:134-36]. Relying on his reasoning that Ms. Schultz should not be "the one to profit" from calibrating the fees to damages, Judge Wasielewski refused to exclude fees that were not only not calibrated to damages but also not calibrated to prosecuting Ms. Schultz and the Journal motion to dismiss. The Journal lawyer acknowledged that, in addition to getting paid to prosecute Ms. Schultz, the Journal judgment was to include their fees "to obtain this judgment and to collect it"[211:46,73][19] and to prosecute "the motion for fees on one ground or another" [Pet:84]. Included in the punitive sanction of attorney fees were fees that resulted from the Journal's deliberate decision to not mitigate their expenses after a Journal lawyer told Judge Wasielewski that the expenses, generated by tampering with Engel's testimony, were necessary because "there was a risk that those claims would go to a jury" and "defamation lawyers don't like juries" so "when Mr. Engel came forward with his report that Ms. Schultz had attempted to suborn his perjury, it presented us with a good opportunity to avoid a jury." [Pet:415] Judge Wasielewski agreed that, because "it doesn't get much better" than the Journal not having to "risk going in front of a jury and defending themselves on this case," Ms. Schultz and ALI would be jointly and severally liable to the Journal in the amount of $168,944.97[20] to cover all of the Journal's attorney

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[19]Without considering the nature of the legal work itemized in the Journal billing records contained in Ms. Schultz's appendix to her brief, the court of appeals erroneously found that "because the fees did not exceed the amount the court determined had been incurred by the Journal [for something] and the award was paid to the Journal, not the State," the fees, that were to "penalize the offender," were not punitive. In direct conflict with the record, the appeals court also erroneously found that the monetary sanction did not exceed "...the amount the Journal incurred in prosecuting its motion to dismiss." [Pet:32]

[20]This amount does not include attorney fees for all ofthe appeals including this appeal to this Court or the 12% interest accruing on the judgment that is now over $200,000.00 even with the weekly garnishment of

fees from the day they met Clary Engel up until the appeal [Pet: 93-94]. Ms. Schultz objected to the gross excessiveness of the punishment and Judge Wasielewski reasoned that the punishment would have been much less if Ms. Schultz would have admitted that the notes, that she prepared for her attorney in the criminal dognapping case, were really to suborn Engel's perjury in that case [Pet:418]. As an additional sanction, however, Judge Wasielewski *sua sponte* punished Ms. Schultz and ALI for exercising their statutory right to appeal by ordering that they pay the Journal attorney fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken"[Pet:83]. At the close of the hearing, the plaintiffs attempted to have the court consider their assets. They provided an expert report that contained financial information that Ms. Schultz supplied to the expert.[21] Ms. Schultz testified that, while she could not testify to the expert's conclusions, she was competent to testify to the accuracy of the financial data that relied on her own tax returns on which she had personal knowledge. The court again applied the rules of evidence, applicable to a jury trial, and refused to consider the financial information [Pet:293-98]. Ms. Schultz again petitioned the court of appeals to exercise it's supervisory power to halt Judge Wasielewski's use of his "inherent power" in his continued vindictive pursuit of Ms. Schultz and in violation of her constitutional rights. Four days later, the court of appeals refused the request and Judge Wasielewski appointed a receiver to liquidate Ms. Schultz's assets [183].

Mr. Schultz's wages and without the appellate fees and costs yet to be added to the judgment.

[21] Although the court of appeals recognized that the trial court was required to "reflect upon equitable considerations in determining the amount of the sanction," their opinion erroneously stated that Ms. Schultz testified that she was not familiar with the financial information in the reports [Pet:32-33] when the record demonstrated the opposite [Pet:293-98] and when Ms. Schultz cited to that record in her brief. [Pet:212-13]

The Journal defamations had already damaged Ms. Schultz and the Animal Lobby, Inc. to where neither had any assets and Ms. Schultz filed bankruptcy. Judge Wasielewski rotated off the case in July of 2000. In a hearing, in front of a new judge, to determine what portion of Mr. Schultz's wages could be garnished[22] and to decide how the Journal was to proceed in taking Mr. Schultz's home, the Journal argued that the judgment was not the result of "injury to another person" but was "a penalty or a fine" for "misconduct before the court" where "the court was in a sense the victim" [Pet:421]. Judge Dugan, the new judge on the case, determined that the only case law that he could "possibly find controlling is if there was some case law saying that, in a situation where someone committed a crime,"only the "criminal's interest" in the marital estate would be available to pay the fine [Pet:423]. Ultimately, Judge Dugan found that granting the Journal motion to take Mr. Schultz's home would violate due process but permitted the Journal to garnish Mr. Schultz's wages.

Ms. Schultz and ALI filed separate appeals [Pet:195-292]and briefing in the court of appeals concluded on January 31, 2001. On March 15, 2001, after denying three plaintiff motions, the two District I appellate court judges disqualified themselves, without providing the explanation required by *§757.19 Wis. Stat.*[23] [Pet:132-33] District IV Judge Vergeront, the third judge, shifted in to replace Judge Cain, who shifted out after being shifted in to replace Judge Fine or Judge Schudson, did not withdraw from the case and the entire case was sent to District IV where Judge Dykman and Judge Lunsten replaced District I Judges Wedemeyer and Curley who withdrew without giving a reason. The panel now was composed of District IV judges Dykman, Lunsten and Vergeront.

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[22]Mr. Schultz was not a party to the defamation action and appealed the garnishment action separately [Pet:377-86].

[23] *757.19(5) Stat.*[Pet:133] requires that, when a judge is disqualified, the judge shall file in writing the reasons for the disqualification. No such reasons were filed in the instant case.

The questions to be resolved in the Wisconsin appellate court were the same as they are now:

1.) Whether Judge Wasielewski, without a jury, an independent prosecutor, the beyond a reasonable doubt standard of proof and notice, abused his "inherent power," by violating Ms. Schultz's *6th and 14th Amendment Constitutional rights*, when he conducted a four day criminal proceeding, requiring elaborate and confusing fact finding, on whether Ms. Schultz had committed the crime of dognapping and had attempted to suborn perjury in both the criminal case and the instant civil case and;

2.) Whether Judge Wasielewski abused his "inherent power," by violating Ms. Schultz's and ALI's *5th and 8th Amendment Constitutional rights*, when he took Ms. Schultz's and ALI's statutory and constitutional right to a jury in the civil case by taking Ms. Schultz's and ALI's valid causes of action, that the Journal valued in the "multiple-millions of dollars" and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict", to severely "penalize" Ms. Schultz to "deter future misconduct," to "maintain its (the court's) integrity" and to "maintain the court's dignity"and;

3.) Whether Judge Wasielewski abused his "inherent power," by violating Ms. Schultz's and ALI's *8th Amendment Constitutional rights*, when, after concluding that there was "no prejudice" or harm caused to the case or to the Journal, he punished Ms. Schultz by taking undefeated and valuable claims and by imposing another excessive $168,944.97 fine that, while made payable to the Journal, did not compensate the Journal for actual losses sustained and;

4.) Whether Judge Wasielewski abused his "inherent power," by violating Ms. Schultz's *5th, 8th, and 14th Amendment Constitutional rights* when he impaired Ms. Schultz's and ALI's statutory right to appeal by *sua sponte* ordering that Ms. Schultz and ALI pay the Journal's attorney fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken,"and;

5.) Whether Judge Wasielewski violated Ms. Schultz's

14th Amendment due process rights by failing to act as an impartial and unbiased magistrate. [Pet:195-292]

In an opinion, that recklessly misstated numerous facts in the record and arguments in the appellants' pleadings,[24] the court of appeals, relying entirely on *Chambers v. Nasco, 501 U.S. 32 (1991)*, did not undertake an analysis on whether the proceeding was criminal or civil in nature and, instead, held that Judge Wasielewski's "inherent powers" authorized him "to hold an evidentiary hearing and to make credibility determinations" to determine if he was the "victim of fraud."[25]

On November 4, 2000, Ms. Schultz and ALI filed separate petitions for review with the Wisconsin Supreme Court [Pet:140-94]. The Journal's response grossly distorted the facts in the record and Mr. Schultz, in his garnishment action, moved the Wisconsin Supreme Court for to impose sanctions against the Journal, pursuant to *§802.05 Wis. Stat.*, for filing false pleadings with the court. [Pet:316-376][26] The Wisconsin Supreme Court denied review and, at the same time, disclosed that Justice Diane Sykes (former Journal reporter and wife of Charlie Sykes) and Justice Crooks (a justice against whom Ms. Schultz had run a campaign) had withdrawn from the decision [Pet:1-2]. Justice Abrahamson and Justice Bradley, both against whom Ms. Schultz had run campaigns, did not

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[24]The appellate opinion's numerous misstatements of the record and of appellants' pleadings necessitated the inclusion of the petitioners' entire appellate briefs in the appendix to this petition. [Pet:140-289]. It should be noted that Wisconsin appellate courts have the benefit of reviewing petitions to the Wisconsin Supreme Court for the purpose of reconsidering their opinion.

[25]The court of appeals accepted Judge Wasielewski's factual finding that no fraud on the court took place. [Pet:31]

[26]The Journal asked the court to strike the motion claiming that Mr. Schultz had "no standing." The Wisconsin Supreme Court, with Justice Prosser dessenting, did not strike but did not consider the motion. [Pet:377-78]

withdraw from deciding whether to grant review, however, and Ms. Schultz filed a motion to reconsider asking that Justice Abrahamson and Justice Bradley withdraw from deciding the motion [Pet:300-315]. As grounds for reconsideration, Ms. Schultz cited the newly discovered evidence that Judge Dykman, the author of the appellate court opinion, was communicating with the Journal Sentinel to get favorable press for his run for Wisconsin Supreme Court while he was considering the appeal of this case, that Judge Vergeront had failed to disclose that she was the sister of a political operative whose public personal confrontation with Ms. Schultz forced him to step down from his position in a campaign and that a false and prejudicial supreme court memorandum about Ms. Schultz to all Wisconsin judges, had never been retracted. She asked the three remaining justices, who had no conflicts, to remand the case back to a panel of appellate court judges who were not prejudiced or conflicted in interest. Ms. Schultz also asked the court, in her response brief [Pet:437-61], for guidance on how to handle newly discovered evidence indicating that the same Journal lawyer, who had permitted Engel to lie in his deposition to cover up his calls to the Journal for money, had arranged the delivery of $900.00 in cash to pay a debt belonging to Clary Engel. [Pet:457-61] Justice Abrahamson and Bradley refused to withdraw from considering the motion for reconsideration and the motion was denied.

REASONS FOR GRANTING THE WRIT

THIS WRIT SHOULD BE GRANTED BECAUSE THE WISCONSIN COURT OF APPEALS, IN A PUBLISHED OPINION, HAS DECIDED IMPORTANT FEDERAL CONSTITUTIONAL QUESTIONS THAT CONFLICT WITH DECISIONS IN UNITED STATES COURTS OF APPEALS, OTHER STATE COURTS OF LAST RESORT AND WITH RELEVANT DECISIONS OF THIS COURT.

The predictions of Justices Rehnquist, Kennedy, Scalia and Souter, in their dissenting opinions in *Chambers v. Nasco*, 501 U.S. 32 (1991), have all come to fruition in this one case

where a Wisconsin court of appeals relied and expanded upon the holdings in *Chambers* to brush aside a *de novo* review[27] on whether Ms. Schultz's and ALI's due process rights were violated by an elaborate criminal fact finding proceeding and by grossly excessive, non-compensatory sanctions and to uphold the trial court's use of his "inherent powers" to impose severe and drastic sanctions for pre-litigation criminal conduct in a two year old criminal case[28] [Pet:18-19]. These issues were not resolved by the Wisconsin Court of Appeals because, in a discretionary review, expansively deferential to the trial court, the court circumvented deciding whether the proceeding and sanctions were civil or criminal in nature by publishing a circular opinion that said that, because the sanctions were "so severe" and the allegation of misconduct was "so serious," due process required no more than an "evidentiary hearing" in which guilt needed not be established beyond a reasonable doubt because "no criminal complaint issued, no loss of liberty was at stake, and no criminal jeopardy attached." [Pet:24-25]

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[27](De Novo review of due process claims is nothing less than a "duty of constitutional adjudication.") *Haynes v. Washington*, 373 U.S. 503, 515 (1963), ("..the question of whether a fine is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context de novo review of that question is appropriate.) *United States v. Bajakajian*, 524 U.S. 321, 336-37 (1998) (*14th Amendment Due Process Clause* requires that state courts of appeals apply a de novo standard when reviewing the constitutionality of sanctions.) *Cooper v. Leatherman*, 121 S.Ct. 1678 (2001). (Discretionary review of excessive punitive damages "invite[s] extreme results that jar one's constitutional sensibilities.") *Pacific Mutual v. Haslip*, 499 U.S. 1, 18 (1991) (Court of Appeals reviews de novo trial court's characterization of proceedings as civil and not criminal in nature) *Bush Ranch v. DuPont*, 99 F. 3d 363, 367 (1996).

[28]The court of appeals found that the sanctions were not "primarily" punishment for pre-litigation conduct [Pet:18]. However, their own opinion relied solely on evidentiary matters relating only to the alleged pre-litigation misconduct [Pet:24-30] and ignored Judge Wasielewski's own findings that the punishment would have been much less if Ms. Schultz would not have been "defiant" and instead admitted guilt in the alleged subornation of perjury in the criminal case. [Pet:418]

"Law is fundamentally about boundaries. One of the most profound boundaries our justice system has drawn is that between the terrain of civil and criminal law." *Redrawing the Criminal-Civil Boundary, 2 Buff. Crim. L.Rev. 679 (1999)*. When that boundary was transgressed, in the instant case, it resulted in a wholesale destruction of constitutional rights that undermined this Court's and Congress' progression towards drawing closer the limitation upon a trial court's ability to impose grossly excessive punishment without the procedural safeguards appropriate to a criminal trial.[29]

In *Hicks v. Feiock, 485 U.S. 624, 625 (1988)*, this Court held that whether a proceeding and the relief given is properly characterized as civil or criminal in nature, for purposes of determining proper applicability of federal constitutional protections, "raises a question of federal law rather than state law." In *Hicks*, this Court looked to state law for guidance in determining the nature of the proceeding. The proceeding and the sanctions in the instant case, however, were not authorized by state statute and were imposed contrary to existing Wisconsin case law [A:AP:132].[30] Additionally, the appellate court, relied almost entirely on *Chambers* as authority to uphold the trial court's sweeping use of his inherent powers in the instant case. Thus, this Court, in considering the nature of

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[29]*United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman*, 121 S. Ct. 1678 (2001), *United States v. Halper*, 490 U.S. 435, 448 (1989), *Young v. Vuitton*, 481 U.S. 787 (1987), *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Degen v. United States*, 517 U.S. 820 (1996), *Austin v. United States*, 509 U.S. 602 (1993). In 1994 , Congress limited contempt fines, imposed for contempts that are also crimes, to $1,000.00 *18 USCA 402* [Pet:137-38] and guaranteed jury trials for indirect contempts that are also crimes *18 USCA 3691*. *[Pet:139] SS402 and 3691* apply in state as well as federal courts.

[30]The court of appeals ignored the contradicting Wisconsin case authority of *City of West Allis v. Wisconsin Electric Power Co.*, 248, Wis. 2d 10, 635 N.W. 2d 873 (2001) (where there is no prejudice, a sanction is unreasonable), and *Vis v. Cushman, Inc.*, 248 Wis. 2d 982, 638 N.W. 2d 393 (2001) (unpublished) (court must consider prejudice to the complaining party before dismissal for dilatory conduct).

the proceedings and sanctions in the instant case, is only constrained to the extent that Wisconsin's inherent powers doctrine conflicts with the inherent powers granted to federal courts. In that regard, the limitations on the application of Wisconsin's inherent powers doctrine is identical to that of federal courts. That is that trial courts may only use their"inherent powers" out of necessity[31] and with great restraint[32] to prevent the abridgment and negation of those

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[31](Inherent powers are those "which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions.") *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 747-748, ((1999). (inherent powers "are those which 'are necessary to the exercise of all others' ") *Roadway Express, Inc. v. Piper*, 447 U.S., at 764; ((SCALIA, J., concurring in judgment) inherent powers only those "necessary to permit the courts to function"). *Young v. United States ex rel. Vuitton et Fils, S.A.*, 481 U.S. 787, 819-820, (1987)

[32](Before imposing the "extremely drastic penalty" of dismissal, "circuit courts must use their authority with restraint and should consider whether there are less severe sanctions that would adequately deter and punish the misconduct.") *Hudson*, 194 Wis. 2d at 542 [Pet:19] (".A district court may not rely on its inherent power to impose a sanction of either default or dismissal without explaining why lesser sanctions were likely to be ineffective.") *Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); ([t]he district court must, before dismissing an action under its inherent powers, consider less drastic sanctions) *Aoude v. Mobile Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (The 9th Circuit directed the district court to provide "a reasonable explanation of possible and meaningful alternatives" to dismissal.) *Halaco Eng'g Co. v. Costle*, 843 F. 2d 376, 381 (9th Cir. 1988) (... "the district court should consider whether the other party has been prejudiced by the misconduct, whether the sanction is proportionate to the transgression, and whether the misconduct is abusive to the judicial process. Importantly, the court should first consider the adequacy of a less severe sanction.) *Dettrich v. Northwest Airlines, Inc.*, 168 F. 3d 961, 964-65 (7th Cir. 1999) (In dismissing a case pursuant to its inherent power a court must determine: existence of certain extraordinary circumstances; presence of willfulness, bad faith or fault by offending party; efficacy of lesser sanctions; relationship or nexus between misconduct drawing the dismissal sanction and matters in controversy in the case; prejudice to the party victim of the misconduct; and government interests at stake.) *Sun World v. Liarazu Olivarria*, 144 F.R.D. 384 (E.D. Cal. 1992); "only the least possible power adequate to the end proposed" should be used in contempt cases." *Young v United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-96 (1987)

constitutional rights reserved to individuals.[33]

In the instant case, the limits on "inherent" powers were clearly breached when, without restraint[34] and without necessity,[35] Judge Wasielewski invoked his "inherent powers" to conduct elaborate fact finding proceedings, that were criminal in nature, to impose severe and drastic penalties, that were not calibrated to damages, to punish Ms. Schultz and the Animal Lobby, Inc. for a crime that had no bearing on the case and that he found had been committed outside of the presence of the court and a year before the civil litigation was brought.

This Court has laid down the law to prevent a person's due process rights from being violated in certain proceedings. In *Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 444 (1911)*, this Court held that, where the sanctioned act is also a crime, the offender must be presumed innocent and guilt must be proved beyond a reasonable doubt. *In re Michael*, 326 U.S. 224, 228 (1945), this Court held that, when perjury is committed in or out of court, the perjurer requires the protections of the criminal process unless the "obstruction" element is present. In *Ex parte Hudgings*, 249 U.S. 378, 382-84 (1918), this Court defined the elements for "obstruction to the Court in performance of its duty" as being an obstructive act done in

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[33]("[e]ven a sensible and efficient use of supervisory power...is invalid if it conflicts with constitutional or statutory provisions.") *Thomas v. Arn*, 474 U.S. 140, 148 (1985). ("the [inherent] power must not abridge or negate those constitutional rights reserved to individuals.") Jacobson v. A.P. Avestruz, 81 Wis.2d 240, 247, (1977).

[34]The appellate court, in the instant case, gave the impression that the trial court undertook the required lesser sanctions analysis when, quite obviously, it did not.

[35]The court of appeals recognized that there was no necessity, in the instant case, when it said: "It would have been much easier for the circuit court to simply deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations to the district attorney's office." [Pet:21]

the presence of the court. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), this Court held that any fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *United Mine* Workers v. Bagwell, 512 U.S. 821, 838 (1994), this Court held that when sanctions are serious and not calibrated to damages, the disinterested factfinding and evenhanded adjudication of a jury are essential. In *Young v. Vuitton*, 481 U.S. 787 (1987), this Court held that the error of permitting an interested party to prosecute contempt is error so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the case. Young, 481 U. S. at 809.

The proceeding, in the instant case, is a criminal proceeding. While the court of appeals changed the trial court's findings of attempted subornation of perjury to findings of litigation misconduct [Pet:24-25], the fact is that the publicly filed judgment clearly says that Ms. Schultz committed the crimes of subornation of perjury and perjury [Pet:3-5][36] which carry with them a stigma and the moral condemnation of the community. Furthermore, the Journal's own reliance on the privileged court findings to publicize, on their front page, that Ms. Schultz attempted to "suborn perjury" from her "friend" "with a felony criminal record"[159:ex:1], is perhaps the most powerful demonstration on why a sanctioned act, that is also a crime, must be proved beyond a reasonable doubt *Gompers* at 444.

In addition to the purpose of the proceeding being to determine whether Ms. Schultz was guilty of a crime, it is undisputed that, from the very beginning, the sole objective of the proceeding was not to make the Journal whole or to compensate the Journal for losses sustained – the necessary

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[36]Although the judgment, drawn up by the Journal, states that Ms. Schultz committed perjury, the trial court specifically found that she did not commit perjury.

element of a civil proceeding. U.S. v. Mine Workers, 330 U.S.258, 303-04 (1947). The sole purpose of the proceeding was to determine whether Ms. Schultz was guilty of a crime and then to punish her for that crime with the purely punitive sanction of dismissal. Judge Wasielewski specifically said that, although there was "no prejudice" to the case or to the Journal [Pet:71], he was taking Ms. Schultz's and ALI's causes of action,[37] that the Journal valued in the "multiple-millions of dollars" [208:45, 212:101-03,210:64] and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict" [Pet:93], and that he was giving those causes of action to the Journal to "penalize" Ms. Schultz, to "deter future misconduct"[38] [Pet:70,81] and to "maintain the court's integrity" [Pet:72].[39] Likewise, the court of appeals repeatedly confirmed that the

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[37]In Societe Internationale v. Rogers, 357 U.S. 197, 209 (1958), this Court explained that "There are constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity to be heard on the merits of his cause." A cause of action, that has accrued, is a vested property right in Wisconsin and is protected by the 14th Amendment's due process clause. Martin v. Richards, 192 Wis.2d 156, 206, 531 N.W.2d 70, 91 (1995). In Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), and Martinez v. California, 444 U.S. 277, 281-82 (1960), this Court held that a cause of action is a species of property protected by the Fourteenth Amendment. The Wisconsin Constitution also provides an inviolate right to a jury trial in a civil case and Wisconsin statute provides for a statutory right to appeal. Those are rights protected by the due process clause of the United States Constitution.

[38]In Falstaff Brewing v. Miller Brewing, 702 F.2d 770, 780 (1983), the 9th Circuit held that the language of the court's orders, that it was imposing sanctions to "deter others from engaging in similar conduct" and to "penalize" Falstaff, reflected the court's intent to impose criminal sanctions.

[39]The test on whether a sanction is punitive, as formulated by the Shillitani Court, is "what does the court primarily seek to accomplish by imposing [the sanction]?" 384 U.S. at 370. In Douglass v. First Nat'l Realty Corp., 543 F.2d 894, 898 (D.C.Cir.1976) the court held: (if the purpose of the relief sought is to punish defiance of the court's authority, then the relief sought is punitive whatever its form; if civil, fine must be compensatory);

taking of the case was to "maintain the dignity" of the court. Clearly, from the very beginning of the proceeding, the trial court sought to vindicate his authority with the purely punitive sanction of dismissal. These are the markings of a criminal proceeding that, when present, mandate a jury, an independent prosecutor and proof beyond a reasonable doubt. In *Harris v. City of Philadelphia*, 47 F.3d 1311 (1995), the 3rd Circuit held that the trial court's dismissal of a motion to modify was an inappropriate sanction for either civil contempt or discovery misconduct because the sanction was "not compensatory" nor "designed to have a coercive effect" thus making the sanction criminal in nature. The court said: "We will not sustain the dismissal of the Motion to Modify as a sanction for criminal contempt, because it is evident that the requisite procedural protections, in particular a jury trial, were not accorded." *Harris at 1329* In *Hovey v. Elliot*, 167 U.S. at 419 (1897), this court said: "If the court had the power to do this by denying the right to be heard to the defendant, what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law?"

It was a violation of due process for the Journal to serve as the prosecutor in the criminal proceeding and they could not recover fees for prosecuting Ms. Schultz. While an award of expenses to prosecute a civil sanction proceeding is permissible, it is well settled that such an award is independent of any award of compensatory damages *Shakman v. Democratic Organization of Cook County*, supra, 533 F. 2d at 351 and; *Hecht v. Don Mowry Flexo Parts, Inc.*, 111 F.R.D. 6, 9 (N.D. Ill. 1986). In the instant case, it was not until the purely punitive sanction of dismissal was imposed, through a criminal proceeding, that the Journal asked for their fees for prosecuting Ms. Schultz for attempted subornation of perjury, for prosecuting their motion to get their fees for prosecuting Ms. Schultz and for collecting on the judgment that they anticipated getting for prosecuting Ms. Schultz. Thus, the fee award, not calibrated to damages, only heightened the prejudice that was already caused by the Journal acting as the prosecutor in the proceeding that was clearly a criminal bench

trial on subornation of perjury. In *Young v. Vuitton*, 481 U.S. 787 (1987), this Court held that the error of permitting an interested party to prosecute contempt is error so fundamental and pervasive that it requires reversal without regard to the facts or circumstances of the case. Young, 481 U. S. at 809. In *Universal Oil v. Root Refining*, 328 U.S. 575, 580 (1946), this Court held that if the rights of parties are to be adjudicated in an investigation for fraud, "the usual safeguards of adversary proceedings must be observed." One of those rights is that an:

> "Amici selected by the court to vindicate its honor ordinarily ought not be in the service of those having private interests in the outcome. Certainly it is not consonant with that regard for fastidiousness which should govern a court of equity, to award fees and costs of amici curiae who have already been compensated by private clients so that these be reimbursed for what they voluntarily paid." *Universal* at 581

The sanctions in this case are criminal in nature. In *U.S. v. Mine Workers*, 330 U.S.258, 303-04 (1947), this Court held that for a sanction to be civil, it must be to compensate for "losses sustained." In *United Mine* Workers v. Bagwell, 512 U.S. 821, 838 (1994), this Court held that when sanctions are serious and not calibrated to damages, the disinterested factfinding and evenhanded adjudication of a jury are essential. In the instant case, however, the court of appeals concluded that *Bagwell* was inapposite[40] because this Court did

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[40]The court also said that *Bagwell* was inapposite because it was "highly fact intensive" and because the monetary sanctions, in the instant case, were payable to the Journal for "prosecuting its motion to dismiss." It was first a misstatement of the record for the appellate court to say that the judgment did not exceed the amount the Journal spent to "prosecute its motion to dismiss" because the record clearly demonstrates the opposite. Second, the proceedings, in the instant case, were so fact-intensive and so confusing that the court of appeals opinion contained over twelve errors in interpreting the facts in surrounding the proceeding..

not indicate that *Bagwell* was limiting the holdings of *Chambers*.[41] Other Courts, however, have found that this Court's "....concerns about the reliability of the fact finder and the rights of the alleged contemnors that *Bagwell* so powerfully articulates are applicable well beyond the cases within its ambit." *Cornel Law Review*, 81 Cornell L. Rev. at 218. (1995) Appellate courts from the 2nd, 9th and the 11th Circuits have applied *Bagwell* in sanction cases where trial courts have used their "inherent powers" to impose severe sanctions without the procedural protections appropriate to a criminal case.[42] Indeed, in a closely analogous setting, the 2nd Circuit, in *Mackler Productions, Inc. v. Cohen*,146 F.3d 126, 128 & 129 (1998), held:

> Although contempts and sanctions are not identical, the Supreme Court's efforts in Bagwell [512 U.S. 821] to distinguish between civil and criminal contempts can be helpful in identifying those sanctions that demand

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[41] Aside from the fact, that Chambers also does not stand for the proposition that a trial court has the "inherent power" to impose sanctions, that are not measured to the losses sustained, it is black letter law that bad faith attorney fees awards are only permitted to make the aggrieved party whole and "are limited to those expenses reasonably incurred to meet the other party's groundless, bad faith proceedural moves." *Browning Debenture Holders' Committee v. DASA Corp.*, 560 F. 2d 1078, 1089 (2d Cir. 1977) Synanon Foundation, Inc. v. Bernstein, 517 A.2d 28 (1986). (D.C. Court of Appeals)

[42] ("The more punitive the nature of the sanction, the greater the protection to which an individual is entitled.") F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, 244 F.3d 1128, 1137 (9th Cir. 2001), Bush Ranch v. DuPont, 99 F. 3d 363, 368 (1996) *See Blalock v. United States*, 844 F.2d 1546, 1560 n. 20 (11th Cir.1988) (per curiam) (Tjoflat, J., specially concurring) ("It requires no citation of authority to say that a district court may not, even unwittingly, employ a civil contempt proceeding to impose what, in law, amounts to a criminal contempt sanction.... When a district court employs civil contempt procedures to punish a contemner, it necessarily deprives the contemner of his constitutional rights and renders his contempt citation a nullity.").

> criminal procedural protections....[S]anctions and contempts raise certain similar concerns. Whether or not a finding of contempt is involved, unfairness and abuse are possible, especially if courts were to operate without any framework of rules or caps on their power to punish. In either case, the individual bears the risk of substantial punishment by reason of obstructive or disobedient conduct, as well as of vindictive pursuit by an offended judge. We conclude, notwithstanding the differences mentioned above, that the imposition of a substantially punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case.

In this first *Mackler* appeal, The 2nd Circuit, relying on *Bagwell*, remanded the imposition of a court payable $10,000.00 fine back to the district court to implement procedural protections appropriate to a criminal proceeding and remanded the imposition of a $45,000.00 attorney fee award to the District Court to determine whether the fees were the result of actual damages. When the trial court, on remand, decreased the fine to $2000.00, did not apply procedural protections appropriate to a criminal case and did not determine if the $45,000.00 was to compensate for damages sustained, the 2nd Circuit Court of Appeals, in *Mackler Productions Inc. v. Cohen*, 225 F.3d 136, 143 (2d Cir. 2000), used its supervisory powers to reverse the lesser $2000.00 punitive sanction and again remanded the $45,000.00 back to the trial court for a determination on whether the $45,000.00, payable to the opposing litigant, was the result of actual damages sustained by an alleged subornation of perjury that was already admitted to in a criminal case. In the last episode of the *Mackler* saga, a new District Judge, in *Mackler Productions, Inc. v. Turtle Bay Apparel Corp., No. 92 Civ 5745 DC., 2001 WL 892815 (August 6, 2001)*, conducted a hearing to determine if there were damages resulting from the perjury that was proved in the criminal case. The District Court concluded that,

because the entire case hinged on the perjury, that was given at trial, the plaintiff was harmed because the case would have never gone to trial without the perjured testimony. Thus, the court found that attorney Cohen multiplied the proceedings by $46,750.00.

The court of appeals, in the instant case, ignored the remand of the $45,000.00 sanction in *Mackler* and found that Mackler was "inapposite" because the $10,000.00 sanction was not payable to the opposing litigant.[43] Furthermore, this Wisconsin Court of Appeals, obviously does not agree with this Court's vigilance in putting the constitutional rights of individuals ahead of a court's interest in maintaining it's "dignity" because its opinion is in direct contrast with Justice Ginsburg's and Chief Justice Rehnquist's concurrence in *Bagwell*, 512 U.S. at 847 where they noted that, since the Virginia Supreme Court's recognition of the fines were to uphold the dignity of the law and public respect for the judiciary, it was enough to indicate that the sanctions were punitive and criminal in nature. In the instant case, the Court of Appeals held that the sanctions did not have to be calibrated to damages "because the court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed" [Pet:17] and that Judge Wasliewski could impose sanctions, not calibrated to damages, to "maintain his dignity" in both this civil case an in another criminal case. [Pet:11,15,16] Thankfully, this court has *never* put the "dignity" of the court ahead of the constitutional rights of an individual. In *Bloom v. Illinois*, 391 U.S. 194, 208 (1968), this Court held:

> "We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual

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[43]Ms. Schultz repeatedly described the Mackler cases in her briefs[Pet:168-70,188-89, 191, 214-15] and Mr. Schultz addressed the court's failure to correctly interpret the case in his motion for sanctions. [Pet:329-331].

> not be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries."

It should be no surprise to this Court that the goal of maintaining the "dignity" and "integrity" of the court was not reached in this case. Most disturbing, however, is that this case is now a lead case distinguishing *Bagwell* – a case that, for the first time, brought rule-of-law concerns to the fore in inherent powers cases. Additionally, the appellate court opinion, in this case, has now given legs to the *Chambers* finding that has been construed as giving trial courts the "inherent power" to sanction pre-litigation misconduct. It is for these reasons, that this case is an apt case in which to advance rule-of-law concerns as part of contempt and inherent powers distinction analysis.

CONCLUSION

For the foregoing reasons, the judgment of the Wisconsin Court of Appeals should be reversed.

Dated at Mequon, Wisconsin, this 25th day of April, 2002.

Respectfully submitted,

Cynthia A Schultz, *acting pro se*

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(2) Supreme Court, U.S.
FILED

No. _____

011612 APR 29 2002

IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

Cynthia A. Schultz
Petitioner

v.

Charles J. Sykes, Journal Broadcast Group, Inc.
and Journal Sentinel, Inc.

On Petition For Writ of Certiorari
To The Wisconsin Supreme Court

APPENDIX VOL. I

Cynthia A. Schultz
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Pet 1

[Seal]

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January 29, 2002

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You are hereby notified that the Court has entered the following order:

No. 00-0915 Schultz v. Sykes L.C. #98CV724

Petitions for review pursuant to Wis. Stat. §§ 80810 having been filed on behalf of plaintiff-appellant-petitioner, Cynthia A. Schultz, and plaintiff-co-appellant-petitioner, The Animal Lobby, Inc., and considered by this court;

IT IS ORDERED that petitions for review are denied, with $50.00 costs.

Crooks and Sykes, J.J., do not participate.

Cornelia G. Clark
Clerk of Supreme Court

STATE OF WISCONSIN CIRCUIT COURT MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ and
THE ANIMAL LOBBY, INC.,

Plaintiffs,

v.

Case No. 98-CV-724
Case Code: 30106
Honorable Francis T. Wasielewski

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP, INC.,
and JOURNAL SENTINEL, INC.,

Defendants.

ORDER FOR JUDGMENT AND JUDGMENT

ORDER FOR JUDGMENT

All defendants moved the Court, pursuant to Section 901.04(3)(d), Stats., and its inherent authority, to dismiss plaintiffs' actions as a sanction for plaintiff Schultz's perjury and subornation of perjury. The Court heard testimony and received evidence on the motion on January 10, 11, 12, and 13, 2000. The Court heard and decided the motion on January 21, 2000. Plaintiffs appeared by Attorneys Ralph J. Ehllinger, Robert E. Sutton and Alex Flynn. Defendants appeared by Attorneys James L. Huston and Paul Bargren.

All defendants moved the Court for an award of attorney fees and costs as sanctions. The Court heard and decided the motion on February 29, 2000. Plaintiffs appeared by Attorney Alex Flynn. Defendants appeared by Attorneys James L. Huston and Paul Bargren. The Court later received testimony and evidence on the reasonableness of attorney fees.

For the reasons stated by the Court in its oral decisions of January 21, 2000, and February 29, 2000, which are incorporated herein by reference,

IT IS ORDERED:

1. Plaintiffs' action is dismissed, on the merits, with prejudice.
2. Judgment is granted to defendants and shall be entered accordingly, including statutory costs of $13,147.66 and attorney fees, disbursements and costs of $155,797.31.

Dated this 27th of March 2000

BY THE COURT:

s/F. T. Wasielewski
Honorable Francis T. Wasielewski
Circuit Court Judge

JUDGMENT

Based on the Court's Order for Judgment dated March 27, 2000:

IT IS ADJUDGED THAT the claims of plaintiff Cynthia A. Schultz, who resides at 11548 River Road, Mequon, Wisconsin 53092, and plaintiff The Animal Lobby, Inc., which resides at 11548 North River Road, Mequon, Wisconsin 53092, are dismiss on the merits, with prejudice, and

IT IS FURTHER ADJUDGED THAT defendants Charles J. Sykes, who resides at 9009 North White Oaks, Bayside, Wisconsin, 53217, Journal Broadcast Group, Inc. which resides at 333 West State Street, Milwaukee, Wisconsin 53202, and Journal Sentinel Inc., which resides at

333 West State Street, Milwaukee, Wisconsin 53202, shall recover costs from the plaintiffs in the sum of $13,147.66 and shall recover attorney fees, disbursements and costs from plaintiffs in the sum of $155,797.31 for a total judgment of $168,944.97.

Dates this 27 day of March 2000

By the Court
John Barrett
Clerk of Circuit Court

By s/Diane Gawronski
Judgment Clerk

Filed
March 27, 2000
John Barrett
Clerk of Circuit Court

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CLERK

REMITTITUR Date: January 31, 2002

District 1/4
Case No. 00-0915
Circuit Court Case No. 98 CV 724

Cynthia A. Schultz
Plaintiff-Appellant,
The Animal Lobby, Inc.,
Plaintiff-Co-Appellant

v.

Charles J. Sykes,
Journal Broadcast Group,
Inc. and Journal Sentinel,
Inc.
Defendants-Respondents

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This cause was an appeal to review the order(s) of the Circuit Court of Milwaukee County.

IT IS ORDERED AND ADJUDGED by this court in an opinion filed on October 04, 2001, that:

Orders affirmed in part; reversed in part and cause remanded with directions.

Panel: Hon. Margaret J. Vergeront
Hon. Charles P. Dykman
Hon. Paul G. Lundsten

The appeal records is hereby returned to the Clerk of Circuit Court for Milwaukee County.

I certify that the above is a correct transcript of the original order and Judgment of the court in the above cause.

Cornelia G. Clark
Clerk of Court of Appeals

2001 WI App 255

COURT OF APPEALS OF WISCONSIN
PUBLISHED OPINION

Case No: 00-0915

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†Petition for Review filed.
† † Petition for Review filed.

Complete Title of Case:

CYNTHIA A. SCHULTZ,

PLAINTIFF-APPELLANT,†

THE ANIMAL LOBBY, INC.,

PLAINTIFF-CO-APPELLANT,† †

v.

CHARLES J. SYKES, JOURNAL BROADCAST GROUP, INC. and JOURNAL SENTINEL, INC.,

DEFENDANTS-RESPONDENTS.

Opinion Filed: October 4, 2001
Submitted on Briefs: June 11, 2001
Oral Argument:

JUDGES: Vergeront, P.J., Dykman and Lundsten, JJ.
Concurred:
Dissented:

Appellant
ATTORNEYS: On behalf of the plaintiffs-appellants, the cause was submitted on the briefs of *Robert E. Sutton* of Milwaukee, and *Ralph J. Ehlinger* of *Ehlinger Law Office,*

LLC, of counsel, Germantown.

Respondent
ATTORNEYS: On behalf of the defendants-respondents, the cause was submitted on the brief of *John R. Dawson, James L. Huston, Paul Bargren* and *Nicole A. Klemz* of *Foley & Lardner*, Milwaukee.

COURT OF APPEALS
DECISION
DATED AND FILED

October 04, 2001
Cornelia G. Clark
Clerk, Court of Appeals
Of Wisconsin

2001 WI App 255
638 N.W.2d 604

No. 00-0915

STATE OF WISCONSIN IN COURT OF APPEALS

CYNTHIA A. SCHULTZ,

PLAINTIFF-APPELLANT,

THE ANIMAL LOBBY, INC.,

PLAINTIFF-CO-APPELLANT,

v.

CHARLES J. SYKES, JOURNAL BROADCAST GROUP, INC. and JOURNAL SENTINEL, INC.,

DEFENDANTS-RESPONDENTS.

APPEAL from orders of the circuit court for Milwaukee County: FRANCIS T. WASIELEWSKI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1. DYKMAN, J. Cynthia A. Schultz and The Animal Lobby, Inc. (ALI) sued Charles J. Sykes, Journal

Broadcast Group, Inc., and Journal Sentinel, Inc.,[1] for defamation. The circuit court dismissed the plaintiffs' claims and awarded attorney fees to the defendants after it found that Schultz had attempted to suborn perjury from a witness. On appeal, Schultz and ALI assert that the circuit court: (1) was without authority to hold an evidentiary hearing, make credibility determinations and then dismiss their suit and award attorney fees and costs; (2) erred when it ruled that Schultz and ALI were limited purpose public figures; (3) erred when it granted summary judgment to the Journal on seventy-eight of their claims; and (4) violated the rights of ALI when it sanctioned ALI for Schultz's misconduct.

¶2. We conclude that the circuit court had inherent authority to both dismiss Schultz's claims and award attorney fees to the Journal as a sanction for her misconduct. Circuit courts are bestowed with those powers necessary to maintain their dignity, transact their business, and accomplish the purposes of their existence. Because ensuring the truthful disclosure of facts is so central to both the court's dignity and the purpose of its existence, circuit courts must have the power to sanction parties if they attempt to suborn perjury from witnesses. Further, this power is not extinguished any time there is a disputed issue of fact; otherwise courts would become powerless to stop abuses of the judicial process whenever a party guilty of misconduct denied his or her wrongdoing. Although the circuit court's dual sanction of dismissal and attorney fees was severe, its finding that Schultz had attempted to suborn perjury from a witness was not clearly erroneous, and therefore the court did not erroneously exercise its discretion when it chose to sanction Schultz with both dismissal and an award of attorney fees. We therefore need not decide whether the circuit court erred in determining that Schultz was a limited purpose public figure or in granting partial summary judgment to the Journal.

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[1]For the sake of brevity and because they have filed a joint brief, we will refer to the respondents collectively as "the Journal" unless otherwise noted.

¶3. However, because the circuit court did not consider whether Schultz's conduct could be imputed to ALI, and the record does not indicate with specificity the extent to which Schultz's and ALI's identities overlap, we remand to the circuit court to consider this issue.

I. Background

¶4. Cynthia A. Schultz is the president of The Animal Lobby, Inc., an animal advocacy organization. Charles J. Sykes is a radio talk show host in Milwaukee, and Journal Broadcast Group, Inc., is his employer. Journal Sentinel, Inc. is the publisher of The Milwaukee Journal Sentinel. On January 28, 1998, Schultz and ALI sued Sykes, Journal Broadcast, and Journal Sentinel for defamation. Among other things, the complaint alleged that Sykes on his radio show and Journal Sentinel in newspaper articles made defamatory statements about both Schultz and ALI, implicating them in the theft of two Gordon Setter dogs in January 1996, and accusing them of paying to have another dog killed for political purposes.

¶5. The Journal moved for summary judgment, which the trial court granted in part but denied with respect to two claims. Several months later, the Journal moved to dismiss the complaint as a sanction, alleging that Schultz had committed perjury and had attempted to suborn the perjury of a witness. Among its allegations, the Journal claimed that Schultz had offered to pay Clary Engel to provide her with a false alibi for the day of the dognapping and to testify falsely that he heard Sykes making defamatory statements about Schultz on the radio and, as a result, had a lower opinion of her. The Journal alleged that Schultz attempted to suborn perjury from Engel in both Schultz's defamation suit and in a criminal case against Schultz, in which she was charged with dognapping.[2]

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[2] Dognapping is prohibited by WIS. STAT. § 951.03 (1995-96), which provides: "No person may take the dog or cat of another from one place to another without the owner's consent or cause such a dog or cat to be confined or carried out of this state or held for any purpose without the owner's

¶6. The trial court scheduled an evidentiary hearing, to begin on January 10, 2000. During the hearing, which lasted several days, both sides offered exhibits and called witnesses to give testimony, and each witness was subject to direct and cross-examination. At the close of the hearing, the circuit court concluded that there was clear and convincing evidence that Schultz had attempted to suborn perjury from Engel. Finding that an attempt to suborn perjury is "serious" and that it "goes to the very heart of the judicial process," the court, citing its inherent authority, dismissed the suit as a sanction for Schultz's misconduct.

¶7. The Journal then moved under Wis. Stat. § 814.025[3] for attorney fees. After another hearing, the trial court concluded that Schultz's and ALI's claims were not frivolous under § 814.025, but that costs and attorney fees incurred by the Journal in prosecuting its motion to dismiss could be awarded under the court's inherent authority. In addition, the court stated that Schultz and ALI would be liable for the Journal's fees and costs "[a]s long as this issue is alive, until there is a final judgment entered from which no appeal is taken." The court noted that the purpose of awarding fees was "both to penalize the offender and also deter future misconduct." After a hearing on the reasonableness of the Journal's attorney fees, the court entered judgment for the Journal in the amount of $168,944.97, for which Schultz and ALI would be jointly and severally liable. Schultz and ALI appeal.

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consent." The dognapping charges against Schultz were ultimately dropped. All references to Wisconsin Statutes are to the 1997-1998 version unless otherwise noted.

[3]Wisconsin Stat. §814.025(1) provides: "If an action or special proceeding commenced or continued by a plaintiff...is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees."

II. Analysis

A. Standard of Review

¶8. Although Schultz and ALI assert that the proper standard of review in this case is de novo, it is well settled that we review a circuit court's decision to impose sanctions, as well as the particular sanction it chooses, for an erroneous exercise of discretion. See *Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991); *Kinship Inspection Service Inc., v. Newcomer*, 231 Wis. 2d 559, 573, 605 N.W.2d 579 (Ct. App. 1999); *Garfoot v. Fireman's Fund Ins. Co.*, 228 Wis. 2d 707, 717, 599 N.W.2d 411 (Ct. App. 1999). Accordingly, we will affirm the trial court's decision if it examined the relevant facts, applied a proper standard of law, and reached a reasonable conclusion. *Garfoot*, 228 Wis. 2d at 717. The issue is not whether we, as an original matter, would have imposed the same sanction as the circuit court; it is whether the circuit court exceeded its discretion in imposing the sanction it did. See *Kinship*, 231 Wis. 2d at 573.

B. Dismissal

1. Authority to Dismiss Case for Attempted Subornation of Perjury

¶9. Wisconsin appellate courts have affirmed the power of circuit courts to impose dismissal as a sanction for litigation misconduct. See, e.g., *Johnson*, 162 Wis. 2d at 273-74; *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995). Cf. *Chevron Chemical Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 946, 501 N.W.2d 15 (1993) (court has authority to enter default judgment as a sanction). Because dismissal is such a harsh sanction, however, the supreme court has held that dismissal is proper only when the plaintiff has acted in bad faith or has engaged in egregious misconduct. *Johnson*, 162 Wis. 2d at 275.

¶10. Schultz and ALI point out that in Wisconsin cases where a sanction of dismissal was upheld, a

statute authorized the sanctions in each case, and that there is no such statute authorizing dismissal for attempted subornation of perjury. While we agree there is no statute in Wisconsin authorizing the circuit court to dismiss this case, case law is clear that a court's power to sanction does not derive from the statutes alone. Rather, circuit courts may also sanction parties for misconduct under their inherent authority. See *Johnson*, 162 Wis. 2d at 273-74 (noting that courts have inherent authority to sanction parties for failure to prosecute, failure to comply with procedural statutes or rules, and for failure to obey court orders); *Schaefer v. Northern Assurance Co. of Am.*, 182 Wis. 2d 148, 162, 513 N.W.2d 615 (Ct. App. 1994) (same). See also *Lee v. LIRC*, 202 Wis. 2d 558, 562, 550 N.W.2d 449 (Ct. App. 1996) (concluding that court had inherent authority to dismiss case because the plaintiff had failed to file a brief).

¶11. The supreme court recently discussed the scope of courts' inherent powers in *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 595 N.W.2d 635 (1999). In *Davis* the court stated that inherent powers are those "which must necessarily be used to enable the judiciary to accomplish its constitutionally or legislatively mandated functions." *Id.* at 747 (internal quotations omitted). Therefore, they include those powers that courts need to "maintain their dignity, transact their business, []or accomplish the purposes of their existence." *Id.* at 748 (internal quotations omitted).

¶12. There are few, if any, functions of a circuit court more vital in maintaining its dignity or accomplishing the purposes of its existence than ensuring the truthful disclosure of facts. When parties attempt to influence witnesses to lie under oath, this at best interferes with the court's ability to impartially adjudicate the instant case, and at worst can undermine both the opposing party's and the public's faith in the integrity of the judiciary. For courts to effectively fulfill their role as impartial arbiters of justice, parties who come to the courts as either plaintiffs or defendants must have confidence that they will be treated fairly and honestly, both by the court and by the opposing

party. Without such confidence, our commitment to the rule of law itself is threatened. Accordingly, we believe that a court must be empowered to protect itself from those egregious practices which threaten the dignity of the judicial process. Because an attempt to suborn perjury undoubtedly threatens this dignity, we conclude that circuit courts have inherent authority to sanction with dismissal a party who has attempted to suborn perjury from a witness.

¶13. Federal and out-of-state case law supports our conclusion. See, e.g., *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 250 (1944) ("Had the District Court learned of the fraud ... it would have been warranted in dismissing [the plaintiff's] case."), *Combs v. Rockwell Intern'l Corp.*, 927 F.2d 486, 489 (9th Cir. 1991) (upholding dismissal with prejudice as a sanction for falsifying deposition testimony); *Cox v. Burke*, 706 So.2d 43, 47 (Fla. Dist. Ct. App. 1998) (holding that dismissal of case is proper where party has engaged in fraud); *Rockdale Mgt Co., Inc. v. Shawmut Bank, N.A.*, 638 N.E.2d 29, 32 (Mass. 1994) (upholding dismissal for proferring forged document, providing misleading answers to interrogatories, and giving false deposition testimony).

¶14. Schultz and ALI argue that dismissal is proper only when the plaintiff acts in bad faith, and that, here, "a finding of bad faith is impossible since the case was not frivolous." Although we agree that Wisconsin permits dismissal as a sanction for misconduct only where the plaintiff has acted in bad faith or engaged in egregious acts of misconduct, we do not agree that "frivolous" and "bad faith" are interchangeable terms. Rather, bad faith "`consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.'" *Garfoot*, 228 Wis. 2d at 719 (quoting *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis. 2d 523, 533, 502 N.W.2d 881 (Ct. App. 1993)); see also *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766 (1980) ("[B]ad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation."). Subornation of perjury is a flagrant and knowing disregard of the judicial process. Therefore, we

cannot conclude that the circuit court misused its discretion in determining that such conduct warranted dismissal.

¶15. Schultz and ALI also suggest that even if dismissal would be appropriate in some cases involving an attempt to suborn perjury, it is not proper here because the perjury allegation was not relevant to the issues being tried. In essence, Schultz is arguing that because Engel was not a crucial witness in establishing her claims, she should not be punished if she asked him to lie. The circuit court did not accept Schultz's assertion that Engel was an unimportant witness, and, we believe, with good reason. Even if we assume, however, that Engel would not have been an important witness, we do not consider that to be a controlling factor in deciding whether the circuit court had authority to dismiss this lawsuit. A circuit court is not required to impose a sanction that reflects the degree of assistance the perjured testimony would have provided to the party. Schultz considered Engel important enough to ask that he testify for her in both the criminal case against her and the defamation suit against the Journal. The fact that Engel might not have been helpful to Schultz does not make an attempt to suborn perjury from him any less a flagrant and knowing disregard of the judicial process. Cf. *Richardson v. Union Oil Co. of Calif.*, 167 F.R.D. 1, 4 (D.D.C. 1996) ("Discovery is not just a game where all that counts is the ultimate score no matter how unethically the players behaved."). Thus, any attempt by Schultz to persuade Engel to lie for her under oath could properly be considered egregious misconduct.

¶16. Similarly, whether the Journal was prejudiced is also not a factor that the circuit court was required to consider. The court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed. Cf. *Johnson*, 162 Wis. 2d at 281-82 (holding that finding of prejudice to the opposing party was not required before dismissing suit as a sanction for disobeying court orders because the plaintiff's misconduct had prejudiced the circuit court's ability "to prevent injustice to the operation of the judicial system as a whole").

¶17. Finally, Schultz and ALI challenge the circuit court's power to dismiss their case because its decision was based partially on evidence that Schultz had attempted to suborn perjury from Engel in the context of the criminal case against her. Because the circuit court had no jurisdiction over that case, Schultz and ALI suggest that it was barred from considering any misconduct that might have occurred in that case. Had the circuit court relied wholly on misconduct that had taken place outside the context of the current suit, we would agree that the circuit court had exceeded its discretion. Circuit courts are not intended to be a "roving commission to inquire into evils and upon discovery correct them." *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935) (CARDOZO, J., concurring).

¶18. This is not, however, what the circuit court did here. First, the circuit court's decision to dismiss was not based solely, or even primarily, on its finding that Schultz had attempted to suborn perjury in the criminal case. Rather, as we will discuss further below, the court also found that Schultz had attempted to suborn perjury on at least two instances in the context of her defamation suit. In assessing the severity of Schultz's misconduct and the need for a corresponding appropriate sanction, the circuit court was within its authority to consider Schultz's previous attempt inasmuch as it showed that Schultz had engaged in a pattern of fraudulent behavior. Second, there was a very close relationship between the perjury allegations in both cases: the parties involved were the same, and there was overlap in the content of the testimony that the court found Schultz attempted to elicit. It is evident, then, that the circuit court was not on a fishing expedition for any type of misconduct it could find. The high degree to which the behavior in both cases was tied together justified the court's decision to also consider both in assessing sanctions. Cf. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 57 (1991) (holding that a court may impose sanctions for misconduct that occurred before other tribunals). In sum, the circuit court's consideration of Schultz's previous attempt at suborning perjury did not constitute an "irrelevant factor," requiring us to conclude that the circuit court erroneously

exercised its discretion.

¶19. There are options other than dismissal available to circuit courts imposing sanctions on parties engaging in fraudulent behavior. Because dismissal is an "extremely drastic penalty," *Hudson*, 194 Wis. 2d at 542, circuit courts must use their authority with restraint and should consider whether there are less severe sanctions that would adequately deter and punish the misconduct. In this case, Schultz and ALI suggest that instead of dismissing the case, the circuit court could have prohibited her from calling Engel as a witness. This suggestion is unrealistic, however, because it is almost certain that Schultz herself would have decided not to call Engel, as it was Engel who provided testimony that Schultz had asked him to lie. In short, because the finding of misconduct consisted of attempted subornation of perjury, we cannot conclude that the circuit court exercised its discretion erroneously by determining that other sanctions would be inadequate.

2. Authority to Hold Evidentiary Hearing and Make Credibility Determination

¶20. Schultz and ALI emphasize that, regardless whether attempted subornation of perjury is misconduct subject to the sanction of dismissal, the circuit court had no authority to hold an evidentiary hearing and make credibility determinations when Schultz denied any wrongdoing. They argue that because they requested and paid for a jury, the circuit court violated their right to a jury trial when it determined that Schultz had attempted to suborn perjury.

¶21. Both the U.S. and Wisconsin Supreme Court agree that courts have inherent authority to investigate claims that a party is engaging in fraudulent behavior or improperly influencing witnesses. See *O'Brien v. State*, 261 Wis. 570, 577, 53 N.W.2d 534 (1952) ("It was not only the right of the court, but its duty, to investigate allegations of [witness tampering] in the interest of protecting witnesses from

intimidation and maintaining such order as would insure honest testimony in the case.") (emphasis added); see also *Chambers*, 501 U.S. at 44 ("[A] court has the power to conduct an independent investigation in order to determine whether it has been the victim of fraud."). We therefore conclude that the circuit court was within its authority to hold an evidentiary hearing.[4]

¶22. Schultz and ALI suggest, however, that a court loses its authority to sanction whenever there is a disputed issue of fact. We cannot agree. Adopting such a rule could often render courts powerless to both prevent and deter abuses of the litigation process. As we have noted in ¶9, Wisconsin case law has long recognized the authority of a circuit court to sanction parties for litigation misconduct. We reject Schultz and ALI's view because we do not believe that article I, section 5, guaranteeing the right to a jury in civil cases at law, was intended to prevent circuit courts from sanctioning litigants whose actions threaten the administration of justice.

¶23. Moreover, as O'Brien noted, the circuit court had a duty to investigate the allegations of misconduct. Although resolving disputed issues of fact regarding the merits of a case is generally the province of the jury, assessing the need for sanctions is undoubtedly the province of the

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[4]We note that federal courts have uniformly held that an evidentiary hearing is the appropriate method for resolving disputed issues of fact in the context of a court's decision whether to impose sanctions. *E.g., Rogal v. American Broadcasting Cos., Inc.*, 74 F.3d 40, 45 (3d Cir. 1996); *Doe v. Maywood Housing Authority*, 71 F.3d 1294, 1299 (7th Cir. 1995); *Didie v. Howes*, 988 F.2d 1097, 1104 (11th Cir. 1993); *Chemiakin v. Yefimov*, 932 F.2d 124, 130 (2d Cir. 1991); *In re Kunstler*, 914 F.2d 505, 520 (4th Cir. 1990); *J.M. Cleminshaw Co. v. City of Norwich*, 93 F.R.D. 338, 351 n.11 (D. Conn. 1981). Furthermore, a litigant's right to a jury trial is not violated if the court, after determining that the plaintiff has engaged in fraudulent behavior, dismisses the suit as a sanction. *E.g., Gonzalez v. Trinity Marine Group, Inc.*, 117 F.3d 894, 898-99 (5th Cir. 1997); *Pope v. Federal Exp. Corp.*, 974 F.2d 982, 984 (8th Cir. 1992); *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 592 (9th Cir. 1983).

circuit court. In sum, we conclude that the circuit court had the authority both to hold an evidentiary hearing and to make credibility determinations, and that Schultz's right to a jury trial was not violated.

¶24. Schultz and ALI insist that, unless the circuit court's decision is reversed, we will be allowing "trial courts to conduct grand jury investigations during the course of civil litigation in an attempt to `end run' jury trials." We do not believe, however, that circuit courts are anxious to rob juries of their role as fact finders, as this case demonstrates. The circuit court had already denied the Journal's motion for summary judgment on two of the appellants' claims. It would have been much easier for the circuit court to simply deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations to the district attorney's office. Thus, we are unwilling to assume that circuit courts will use perjury allegations to avoid a jury trial, particularly when a circuit court has other, much less time consuming methods of doing so if it were so inclined. Rather, we agree with the supreme court that "the circuit courts of this state will remain mindful that `the law prefers whenever reasonably possible, to afford litigants a day in court.'" *Johnson*, 162 at 287 (quoting *Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N.W.2d 865 (1977)).

3. Due Process

¶25. We also disagree with Schultz's contention that the circuit court denied her right to due process. Due process requires notice and opportunity to be heard. *Riemer v. Riemer*; 85 Wis. 2d 375, 377, 270 N.W.2d 93 (Ct. App 1978). *Latham v. Casey & King Corp*, 23 Wis. 2d 311, 316, 127 N.W.2d 225 (1964). Although Schultz argues that she had no notice, we believe this assertion to be disingenuous. First, the circuit court held the evidentiary hearing in response to the Journal's motion to dismiss the suit as a sanction for perjury and attempted subornation of perjury. Second, Schultz's attorney acknowledged during the hearing that dismissal would be a possible sanction if Engel's testimony was believed. Therefore,

Schultz cannot argue that she had no notice of the possibility of a sanction or the basis on which it would be imposed.

¶26. The circuit court also provided Schultz with an opportunity to be heard. Schultz was given a four-day evidentiary hearing, in which she could provide testimony, present exhibits, and cross-examine adverse witnesses. Due process requires no more than this.

¶27. Schultz also cites numerous instances during the hearing in which she claims her right to due process was violated. Other than her claim that evidence was improperly excluded, however, she provides no legal authority to support her assertions, and, therefore, we will not address them. See *State v. Beck*, 204 Wis. 2d 464, 472, 555 N.W.2d 145 (Ct. App. 1996). With regard to the excluded evidence, Schultz argues that the circuit court erred "by refusing to let plaintiffs use the information contained in Mr. Engel's criminal record to impeach Mr. Engel," citing *Green v. Bock Laundry Machine Co.*, 490 U.S. 504 (1989), for the proposition that circuit courts "must permit impeachment of civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony." We note first that *Green* was an interpretation of F. R. Evid. 609(a)(1), not a holding regarding the requirements of due process, so it is not binding on Wisconsin circuit courts. Second, *Green* was superseded by statute in 1990 when Congress amended Rule 609(a)(1), so that the rule now expressly provides that prior convictions of witnesses in civil actions shall be admitted only if the court determines that the probative value outweighs its prejudicial effect. See *Daniels v. Loizzo*, 986 F. Supp. 245, 250 n.7 (1997) (recognizing *Green's* abrogation).

¶28. In this case, the circuit court allowed Schultz to introduce evidence that Engel had been convicted nine times from 1985 to 1990 of crimes relating to dishonesty, such as burglary and obstructing an officer, and also permitted her to question Engel with regard to an act from 1997 involving fraud, for which Engel was not convicted. However, the circuit court also prohibited Schultz from offering evidence regarding:

(1) a child abuse and an assault conviction from 1994 because they were not crimes of dishonesty; (2) incidents for which Engel was investigated, but never convicted because they had occurred more than ten years ago; and (3) the nature of any of the offenses for which Engel was convicted. Whether to admit prior conviction evidence for impeachment purposes under Wis. Stat. § 906.09[5] is a matter within the discretion of the trial court. *State v. Kruzycki*, 192 Wis. 2d 509, 525, 531 N.W.2d 429 (Ct. App. 1995).

¶29. With regard to the child abuse and assault convictions, Wis. Stat. § 906.09(2) states that evidence of a conviction may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice." In deciding whether this test has been met, the circuit court may consider whether the crime involved dishonesty or a false statement. *State v. Smith*, 203 Wis. 2d 288, 296, 553 N.W.2d 824 (Ct. App. 1996). Because we agree that child abuse and assault are not crimes of dishonesty, we conclude that the circuit court did not misuse its discretion in excluding these convictions from evidence.

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[5]Wisconsin Stat. § 906.09 provides in part:

> Impeachment by evidence of conviction of crime or adjudication of delinquency. (1) GENERAL RULE. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime or adjudicated delinquent is admissible. The party cross-examining the witness is not concluded by the witness's answer,
>
> (2) EXCLUSION. Evidence of a conviction of a crime or an adjudication of delinquency may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice,
>
> (3) Admissibility of conviction or adjudication. No question inquiring with respect to a conviction of a crime or an adjudication of delinquency, nor introduction of evidence with respect thereto, shall be permitted until the judge determines pursuant to s.901.04 whether the evidence should be excluded.

¶30. We also conclude that the circuit court did not erroneously exercise its discretion in excluding Engel's prior bad acts. WIS. STAT. § 906.08(2) allows impeachment of a witness using specific instances of conduct only when the conduct is "not remote in time." As the prior bad acts in question all occurred before 1991, the court did not erroneously exercise its discretion by excluding them.

¶31. Finally, with regard to the court's limit on the evidence relating to the nature of the convictions, we have held that the scope of inquiry for impeaching witnesses through prior convictions is very narrow. *State v. Sohn*, 193 Wis. 2d 346, 353, 535 N.W.2d 1 (Ct. App. 1995). Counsel may ask if the witness has been convicted of a crime, and if so, how many times. Id. If the witness's answers are truthful and accurate, no further inquiry may be made. Id. Engel admitted on cross-examination that he had been convicted nine times. Therefore, no further inquiry was permissible and the circuit court correctly prohibited more questions.

4. Circuit Court's Findings

¶32. Schultz contends that the record does not support the circuit court's finding that she attempted to suborn perjury from Engel. We review a circuit court's findings of fact under a clearly erroneous standard. *Vince v. Voight*, 2000 WI 93, ¶69, 236 Wis. 2d 588, 614 N.W.2d 388; Wis. Stat. § 805.17(2). We must accept the circuit court's assessment of the credibility of a witness unless we can say that a witness was credible or incredible as a matter of law. *Hallin v. Hallin*, 228 Wis. 2d 250, 258-59, 596 N.W.2d 818 (Ct. App. 1999).

¶33. First, Schultz argues that the circuit court erred when it failed to require a showing of proof beyond a reasonable doubt. Because attempted subornation of perjury is a crime, Schultz reasons that the criminal burden of proof should have been applied. Schultz is incorrect that the criminal burden should have applied, however, because Schultz was not found guilty of committing a crime by the circuit court. Rather, the court determined that she had

engaged in litigation misconduct warranting a sanction. No criminal complaint issued, no loss of liberty was at stake, and no criminal jeopardy attached. Therefore, the fact that attempted subornation of perjury is an act that could be prosecuted as a crime does not convert a sanction hearing in a civil case into a criminal trial.

¶34. We agree with the circuit court that the correct standard of proof to apply was clear and convincing evidence. Both because the sanction of dismissal is so severe and the allegation of misconduct is so serious, we believe that a heightened standard of proof is appropriate. Federal courts agree that clear and convincing evidence is required before a court may dismiss a case for fraudulent behavior. *Shepherd v. American Broadcasting Cos., Inc.*, 62 F.3d 1469, 1477 (D.C. Cir. 1995); *Aoude v. Mobile Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989); *Pfizer, Inc. v. Intern'l Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976).

¶35. At the end of the hearing, the circuit court concluded that Schultz had asked Engel to testify falsely on at least three separate occasions: (1) in July 1997, during the pendency of criminal proceedings against Schultz for her alleged involvement in a 1996 dognapping; (2) in Schultz's home during July 1998, after the criminal charges were dropped and Schultz filed a defamation case against the Journal; and (3) on September 3, 1999, just before the Journal deposed Engel.

¶36. In coming to this conclusion, the court relied primarily on the testimony of Clary Engel. Engel was an acquaintance of Schultz, who Schultz met in 1995 after Engel's dog was involved in an accident and Schultz offered to pay for the surgery. According to Engel, after Schultz was charged with the dognapping of two Gordon Setters in Whitefish Bay, Wisconsin, Schultz asked him to provide her with a false alibi for the evening that the dogs were stolen. After the criminal charges were dropped, Engel stated that Schultz asked him to provide the same false alibi in the context of her defamation suit against the Journal and offered to share her recovery with

him if she was successful. In addition, Engel testified that Schultz asked him to lie and testify that he had listened to Sykes' radio show in which Sykes' had accused Schultz of paying someone to kill a dog for political purposes, and that Sykes' statements had lowered Engel's opinion of Schultz. Engel also testified that Schultz admitted to him that she was the one who had taken the Gordon Setter dogs.

¶37. Schultz's version of events was quite different from Engel's. She denied asking him to lie for her in either the criminal case or the defamation case. Although she admitted she had known the whereabouts of the Setters, she also denied having stolen or transported them, or that she told Engel that she had taken the dogs. According to Schultz, Engel was with her on January 17, 1996, the day the Setters were stolen, and he also told her that he had listened to Syke's show when Sykes was discussing Schultz. Schultz also testified that Engel had asked to be a witness in both the criminal case and the defamation suit, but in August 1999, Engel asked Schultz for $2,000, threatening that he would "put on a big performance" if she did not comply. She testified that she had tried to tape a telephone conversation with Engel so that she could obtain evidence of his demand, but that the recorder malfunctioned, ruining the tape, so she threw the tape out. Schultz admitted that she met with Engel just before his deposition on September 3, 1999, but she claimed that it was not to suborn perjury from him, but rather to persuade him to talk to her attorney. She stated that both times Engel made the money demand, she refused him.

¶38. Schultz argues that Engel's testimony is not credible for a number of reasons, including that he: (1) has been convicted of numerous felonies and misdemeanors; (2) first testified that he had only five convictions even though it was later established that he had more than this; (3) lied about the number of times he had met with the Journal's lawyers; (4) does not remember talking to two of Schultz's attorneys, even though both of them testified that they did speak with him; and (5) asked both the Journal Sentinel and Sykes for money in exchange for information and then failed to reveal that he

did so in his deposition.

¶39. While we agree that all of these are factors that the circuit court could have considered in assessing Engel's credibility, we do not believe that they require us to conclude that Engel's testimony was not credible as a matter of law. With regard to Engel's convictions, the court acknowledged that Engel had been convicted a number of times, but concluded that because of their remoteness in time, the convictions did not preclude the court from accepting Engel's testimony as true. We do view as troubling Engel's request for compensation from the Journal Sentinel and Sykes, which is now undisputed. Again, however, it does not compel a determination that Schultz must be believed over Engel. Engel explained that the reason he made the request was that he believed journalists provided compensation for news stories, and that he did not reveal it at the deposition because he did not think he had done anything wrong. One reasonable inference that could be taken from Engel's request is that he was trying to sell his testimony to the highest bidder, but it would also be reasonable to infer that his explanation was the truth. When more than one inference is reasonable, it is the function of the trial court sitting as fact finder, not this court, to decide which inference to draw. *Garfoot*, 228 Wis. 2d at 725.

¶40. In addition to Engel, the court also relied on the testimony of several other witnesses, including Barbara Manson and June Ellen Jones. Manson and Jones both had the Setters in their custody for a time before the dogs were returned to their owner. Although Manson and Jones did not provide testimony that Schultz had attempted to suborn perjury from Engel, the court concluded that they corroborated Engel and undermined Schultz's testimony because both of their testimonies conflicted with Schultz and because Manson testified consistently with Engel that Schultz told her that the dogs were in her custody. We agree with the circuit court that both Manson and Jones tend to discredit key parts of Schultz's version of events.

¶41. The circuit court also relied on several exhibits that had been introduced during the hearing. Among these was a document created by Schultz during her preparation for the criminal case. At the top of the document is typed "Clary Engel," followed by forty-two typed questions and answers regarding Engel's activities on January 17, 1996, the day the Gordon Setters were stolen (e.g. "Were you at Cindy[Schultz]'s house on the day and early evening of January 17, 1996?" "Yes"). During his testimony Engel stated that the document was created by Schultz and intended to be used by him as a script for the purpose of giving perjured testimony in the form of a false alibi. Engel claimed Schultz wrote out both the questions and the answers on her own and then gave the document to Engel for him to memorize. He also testified that none of the answers were true. Schultz admitted that she did type questions out to go over with Engel, but testified that the answers came from Engel and that she did not insert the answers until after she interviewed him. She further asserted that the answers in the document were what actually happened.

¶42. In concluding that Schultz had created the documents for the purpose of suborning perjury, the circuit court noted that Schultz admitted that at least one of the answers was false. Specifically, question one on page five of the document asked, "Did you talk to Cindy [Schultz] about your testimony?" The typed answer states, "NO," even though Schultz admitted that she had gone over Engel's testimony with him. Schultz was unable to explain during her testimony why she had written the false answer. Furthermore, typed on another document that was included with the questions and answers was the message: "Clary [Engel]: Study this stuff. Don't show it to ANYONE not even my attorney." Schultz did not deny typing this message.[6] The court concluded that this supported an inference that Schultz created the document for

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[6]In attempting to explain the note, Schultz testified that, because she had had negative experiences with lawyers, she did not want any lawyers involved with a witness "until I had somebody completely and totally on my case."

fraudulent purposes, and we cannot conclude that this is an unreasonable inference.

¶43. In deciding that Schultz was not credible, the circuit court emphasized that while Schultz had the greatest incentive to lie, there was no apparent motive for Engel, Manson, and Jones to falsely contradict Schultz's testimony. The appellants too have failed to provide possible reasons for why these individuals would want to perjure themselves for the sake of hurting Schultz.[7] In her brief Schultz claims that Manson and Jones did not contradict her testimony and that "only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston [one of the Journal's attorneys], Ms. Rowe [one of Schultz's former attorneys], Ms. Majerus, Ms. Volk [a friend of Schultz who was involved in the dognapping], Ms. Kiedrowicz [Schultz's sister], and Mr. Ehlinger [one of Schultz's current attorneys] were all lying could Mr. Engel's version of events be true." Schultz, however, provides no citation to the record to support this assertion, nor does she explain how each of these individuals contradicted Engel's testimony. Rather, Schultz admitted under oath that her testimony conflicted with that of Engel, Manson, Jones, and also Detective Staudacher, one of the officers who had investigated the dognapping case.

¶44. The court also noted that Schultz never communicated Engel's money demand to anyone until after Engel testified in his deposition that Schultz had attempted to suborn perjury from him, and that she had not told police about having an alibi on the evening of the dognapping when they first questioned her. Finally, the court stated that during the hearing, Schultz had been unwilling to agree to answer questions that had obvious answers, avoided questions by giving unrelated answers, and had a "convenient memory."

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[7]During the hearing, Schultz's attorney questioned Engel about a decision by Schultz to neuter Engel's dog without his permission, and suggested that this would have created hostility toward Schultz. Engel, however, denied that he was upset about it, and Schultz and ALI have not asserted this as a possible explanation on appeal.

¶45. After independently reviewing the hearing testimony and exhibits, we conclude that the evidence permitted the circuit court to find that there was clear and convincing evidence that Schultz had attempted to suborn perjury from Engel. Accordingly, we determine that the circuit court properly exercised its discretion in dismissing Schultz's claims. We therefore need not decide whether Schultz is a limited purpose public figure or whether the circuit court was correct in granting summary judgment to the Journal on all but two of Schultz's claims. See *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

C. Attorney Fees

¶46. Upon dismissal of the case, the Journal filed a motion for costs and attorney fees. After holding two additional hearings on the appropriateness of awarding fees and on the reasonableness of the amount claimed by the Journal, the circuit court awarded fees and costs in the amount of $168,944.97 as an additional sanction for Schultz's misconduct. We review the circuit court's decision to award attorney fees as a sanction and the amount it chose to award for an erroneous exercise of discretion. *Hur v. Holler*, 206 Wis. 2d 335, 341-42, 557 N.W.2d 429 (Ct. App. 1996); *Schaefer*, 182 Wis. 2d at 163.

¶47. Schultz and ALI challenge the award of fees on several grounds. First, they argue that the American Rule prohibits courts from awarding attorney fees to the prevailing party unless it is provided for by contract or statute. See *City of Beloit v. Town of Beloit*, 47 Wis. 2d 377, 392, 177 N.W.2d 361 (1970). Although we agree this is the general rule, it does not apply in the context of awarding fees as a sanction for misconduct. This was recognized by *Schaefer*, which held that courts have the inherent authority to assess attorney fees as a sanction. 182 Wis. 2d at 163. The Supreme Court has also held that the American Rule does not bar courts from exercising their inherent power to assess attorney fees. *Chambers*, 501 U.S. at 45-47. Furthermore, because the circuit court relied on its inherent authority to award fees, the

appellants' attempt to rely on the limitations of fee awards under Wis. Stat. § 814.025 is unpersuasive.

¶48. Second, Schultz and ALI argue that a sanction of attorney fees could be justified in the case of a fraud on the court, but then cite federal case law to support their assertion that, even accepting the circuit court's factual findings, no fraud on the court took place. We need not decide, however, whether Schultz meets the elements for a fraud on the court. As we noted in ¶7, the test in Wisconsin for imposing sanctions is whether the party acted in bad faith or engaged in egregious misconduct. Because we have already concluded that attempted subornation of perjury is egregious, it is unnecessary to consider whether Schultz has also committed a fraud upon the court.[8]

¶49. Third, Schultz and ALI contend that the sanction of attorney fees was "purely punitive" and was akin to a criminal penalty. Relying on *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), and *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126 (2d Cir. 1998), Schultz and ALI therefore assert that a jury trial and proof beyond a reasonable doubt were required. In *Bagwell*, the Supreme Court held that a $52 million dollar fine, imposed by a district court for a party's failure to obey a detailed injunction, was properly classified as a criminal contempt sanction and thus required the procedural protections that would be afforded under criminal law. 512 U.S. at 836-38. The Second Circuit in *Mackler* interpreted *Bagwell* as also requiring criminal procedural protections in certain instances when civil sanctions are imposed for discovery abuses. *Mackler*, 146 F.3d at 129.

¶50. We believe that both *Bagwell* and *Mackler* are inapposite. We note first that *Bagwell* was highly fact-intensive and did not purport to establish universal

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[8]Schultz again argues that attorney fees can be awarded only when a party has acted in bad faith, which she claims requires a showing that the party's claims were without merit. We have considered and rejected this argument in ¶14, and need not address it again here.

requirements for all penalties imposed by a court. The most prominent difference between *Bagwell* and the present situation is that here, the circuit court's penalty was an award of attorney fees for the amount the Journal incurred in prosecuting its motion to dismiss while in *Bagwell* it was a $52 million non-compensatory contempt fine, payable to the Commonwealth of Virginia rather than to the opposing party. 512 U.S. at 834. Of particular concern to the Court in *Bagwell* was the fact that the fine had no relation to the loss incurred by the other party. Id. Notably, *Bagwell* did not indicate that it was limiting the holding of *Chambers v. NASCO*, Inc., 501 U.S. 32 (1991), which recognized the inherent authority of courts to award attorney fees as a sanction for bad-faith conduct within the context of a civil proceeding.

¶51. *Mackler* likewise fails to support the appellants' argument. Although *Mackler* extended *Bagwell*'s holding to include certain sanction proceedings involving discovery abuses, its decision was limited to sanctions that were explicitly punitive and payable to the court rather than the opposing party. *Mackler*, 146 F.3d at 129. A later Second Circuit case made this clear when it upheld a district court's decision to award attorney fees, imposed without criminal procedural protections, as a sanction for making false statements and in spite of the party's objection that the sanction was contrary to *Mackler*. *Margo v. Weiss*, 213 F.3d 55, 62-63 (2d Cir. 2000). Although the circuit court in this case stated that it was awarding fees in part to "penalize the offender," the sanction was not purely punitive because the fees awarded did not exceed the amount that the court determined had been incurred by the Journal and the award was paid to the Journal, not to the State. In sum, there is nothing in either *Bagwell* or *Mackler* requiring the circuit court to grant a jury trial or apply a reasonable doubt burden of proof before it awarded attorney fees as a sanction.

¶52. Fourth, Schultz and ALI argue that the circuit court erred when it failed to consider the relative wealth of the parties in determining the amount of sanctions. Under *Jandrt ex rel. Brueggeman v. Jerome Foods, Inc.*, 227 Wis. 2d 531,

597 N.W.2d 744 (1999), circuit courts are required to "reflect upon equitable considerations in determining the amount of the sanction," including the assets of the sanctioned party. Id. at 577-78 (quoting *Brown v. Federation of State Medical Boards of U.S.*, 830 F.2d 1429, 1438-39 (7th Cir. 1987)); see also *White v. General Motors Corp., Inc.*, 908 F.2d 675, 685 (10th Cir 1990) (because primary purpose of monetary sanction is to deter misconduct rather than compensate opposing party, ability to pay must be considered in determining amount of sanction). It was Schultz's burden, however, to come forward with evidence regarding her financial status. See *White*, 908 F.2d at 683. Schultz contends that she met this burden, but we disagree. The only documents Schultz offered that reflected her financial situation were two reports prepared by experts analyzing the losses incurred by Schultz as a result of the Journal's alleged defamation. The circuit court rejected these documents as hearsay because the expert was not there to testify and Schultz was not familiar with the documents.[9] The circuit court did not misuse its discretion in refusing to consider the reports. An expert report is hearsay and cannot be accepted into evidence unless it falls into one of the hearsay exceptions. See *R.S. v. Milwaukee County*, 162 Wis. 2d 197, 204-05, 470 N.W.2d 260 (1991). The appellants have not suggested that the report is an exception to the hearsay rule, and we are unable to locate one that applies.[10]

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[9]In response to a question regarding what the exhibits contained, Schultz responded, "To be honest, I have not even read this. I just got this from Ralph [Ehlinger, Schultz's attorney]. I have not even seen these things."

[10]Apart from their argument that the relative wealth of the parties must be considered, neither appellant challenged the reasonableness of the fee award in their main briefs so we need not consider this issue. Although Schultz states in her reply brief that she is challenging the award's reasonableness, she fails to explain why she believed the circuit court's determination was in error. Therefore, this argument was waived. In re Estate of Bilsie, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981) (appellant may not raise issue for the first time in reply brief); Reiman Assocs., Inc. v. R/A Advertising, Inc., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue raised but not briefed or argued is deemed abandoned).

¶53. We recognize the severity of the circuit court's sanctions. Although as an original matter we may not have imposed a dual sanction of dismissal and attorney fees, that is not the test. The question is whether the circuit court erroneously exercised its discretion in imposing the sanction it did. See *Kinship,* 231 Wis. 2d at 573. We previously recognized in Hur a circuit court's authority to impose both dismissal and attorney fees as a sanction for litigant misconduct. 206 Wis. 2d at 337. Although Hur was decided under statutory authority, we see no meaningful distinction when the court uses its inherent authority. Accordingly, because we conclude that the circuit court did not erroneously exercise its discretion, we affirm its decision to dismiss Schultz's case and award attorney fees as a sanction for her attempted subornation of perjury. However, because the circuit court also awarded attorney fees through appeal, we remand for a determination of those fees.

D. The Animal Lobby, Inc.

¶54. In imposing sanctions, the circuit court dismissed the claims of both Schultz and ALI, and made them jointly and severally liable for the award of costs and fees. However, the court never mentioned ALI in its oral decisions, but referred only to Schultz. ALI now argues that the circuit court erred in imposing sanctions on ALI for the misconduct of Schultz. The Journal argues that because Schultz is the president of ALI, her misconduct should also be considered the misconduct of ALI, so that it was unnecessary for the court to expressly consider ALI apart from Schultz.

¶55. We do not believe that Schultz and ALI should be treated as one solely because Schultz is ALI's president, and the parties have not cited to portions of the record that would more fully explain the extent to which ALI's identity overlaps with Schultz's. Because the circuit court did not explain its reasoning for dismissing ALI's claims and holding it liable for attorney fees along with Schultz, and we have not uncovered an independent basis for its decision in the record, we conclude that it exercised its discretion erroneously

by failing to address ALI separately. See *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶56. The Journal also argues, however, that whatever claims ALI might have had were lost because it failed to first demand a retraction of the allegedly libelous statements as required by Wis. Stat. § 895.05(2)[11] before filing its lawsuit. ALI responds that the statute did not require it to request a retraction for the statements made by Sykes on his radio show and that all three respondents are barred from using ALI's failure to request a retraction as a defense because they failed to raise this issue in the circuit court.

¶57. We agree with ALI that it was not required to request a retraction from Sykes because his statements were not made in print. See It's in the *Cards, Inc. v. Fuschetto*, 193 Wis. 2d 429, 436, 535 N.W.2d 11 (Ct. App. 1995) (holding that notice requirement of Wis. Stat. § 895.05(2) applies only to libel made in print). We do not agree, however, that we are

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[11] Wisconsin Stat. § 895.05(2) provides: Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as the libeled person's statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

precluded from considering ALI's failure to make the request with respect to the Journal Sentinel because the Journal Sentinel failed to raise the issue in the circuit court. Failure to request a retraction under Wis. Stat. § 895.05(2) is not an affirmative defense. Rather, the notice requirement of the statute is a condition precedent to the existence of a cause of action for libel where the statute applies, and a circuit court is not competent to hear the claim until the condition is met. Cf. *Elm Park Iowa, Inc. v. Denniston*, 92 Wis. 2d 723, 728-29, 286 N.W.2d 5 (Ct. App. 1979) ("[N]o civil action for damages can be brought or maintained unless the condition precedent of required notice is given."); see also *Hucko v. Jos. Schlitz Brewing Co.*, 100 Wis. 2d 372, 380-81, 302 N.W.2d 68 (Ct. App. 1981) (holding that failure to request retraction under § 895.05(2) requires that claim be dismissed). The Journal denied in its answer that ALI had demanded a retraction, and that was all it was required to do. Therefore, because ALI never demanded a retraction from the Journal Sentinel, its claim against the Journal Sentinel must be dismissed.

¶58. On remand, the circuit court must consider whether Schultz's misconduct can be imputed to ALI. If the court concludes that the two appellants should be treated separately, then it must permit ALI's surviving claims against Sykes and the Journal Broadcast Group to proceed to trial and ALI may not be held liable for the Journal's fees and costs. If the court concludes that Schultz's conduct can properly be imputed to ALI, then ALI's claims may be dismissed and the court may hold ALI and Schultz jointly and severally liable for the Journal's fees and costs. *By the Court.*—Orders affirmed in part; reversed in part and cause remanded with directions.

Recommended for publication in the official reports.

STATE OF WISCONSIN : CIRCUIT COURT: MILWAUKEE COUNTY
HON. CHRISTOPHER R. FOLEY
CIVIL DIVISION
BRANCH #14

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CYNTHIA A. SCHULTZ, and
THE ANIMAL LOBBY, INC.,

Plaintiffs.

vs. Case No. 98 CV 000724

CHARLES J. SYKES, JOURNAL
BROADCAST GROUP, INC., and
JOURNAL SENTINEL, INC.,

Defendants.

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MOTIONS

The following proceedings were had upon the above-entitled matter before the HONORABLE CHRISTOPHER R. FOLEY, Circuit Court Judge, Civil Division, Branch #14, Milwaukee, Milwaukee County, State of Wisconsin, on the 21st day of September, 15 1998.

APPEARANCES:

RALPH J. EHLINGER, and R. JEFFREY KRILL,
Attorneys-at-Law, Ehlinger & Krill, S.C.,
316 N. Milwaukee Street, Suit 410,
Milwaukee, Wisconsin 53202, appeared on
behalf of the Plaintiffs.

JAMES L. HUSTON, and PAUL BARGREN,
Attorneys-at-Law, Foley & Lardner,
777 East Wisconsin Avenue,
Milwaukee, Wisconsin 53202-5367, appeared on
behalf of the Defendants.

June K. Teeguarden, Court Reporter.

P_R_O_C_E_E_D_I_N_G_S_
WHEREUPON, the following proceedings were had in open court:
THE CLERK: Schultz versus Sykes, Journal Broadcast, Journal Sentinel, Inc. Appearances please.
MR. EHLINGER: Your Honor, appearing for the Plaintiff, I'm Ralph Ehlinger and with my partner, Jeffrey Krill, of the law firm of Ehlinger and Krill.
THE CLERK: K-R-I-L-L?
MR. EHLINGER: That's correct.
MR. HUSTON: For the Defendant, appearing by Foley and Lardner by James L. Huston H-U-S-T-O-N and Paul Bargren, B-A-R-G-R-E-N.
THE COURT: Okay. This is here on the defendants' motion for summary judgment. I have previously determined correctly or incorrectly, as the case may be, I'm sure that depends upon which table you are sitting at and probably will be reviewed at some point; that Miss Schultz was a limited purpose public figure. Let me start with two preliminary things. I apologize to the lawyers that we bumped this a couple of weeks ago. We were in the midst of a three-week medical-mal practice wrongful autopsy case and it just -- there was no way I was going to try to entertain this during the course of that proceeding so we had to bump it and I apologize. Also it occurred to me over the weekend, while I was reading this that, and correct me if I'm wrong, gentlemen; but I don't believe I have ever addressed the issue of Mr. Sykes and Judge Sykes, et cetera, and I think I ought to make a record in that regard. It will come as no shock to any of you that you -- I know Judge Sykes. I considered her a friend. We have -- certainly aren't the closest of colleagues on the bench. Until very recently I virtually never saw her because she was over on the Criminal bench and I was here for the last two years and out at Children's Court, which most other judges consider to be Siberia, previous to that. I - given the nature of our relationship and her relationship to Mr. Sykes I don't have any

reservations about handling this case at all. As to Mr. Sykes I probably may be better situated than any other Milwaukee County judge to do this. I -- with 6 kids I -- I have very little time for socialization, et cetera. To my recollection I have never met Mr. Sykes. I do recall one instance in which I communicated directly with him. He had -- I was advised that he had editorialized about a decision that I had made. Person who had -- who heard it drew the inference that he was suggesting that I wasn't as -- I should have imposed a longer sentence. I did write to him pointing out to him that I had imposed the maximum sentence. And I was advised that he was nice enough to -- I later heard, was advised that he did, in fact, read the letter on the air and acknowledged that he had been unaware that it was a maximum sentence. I guess I also should point out that we have some neighbors across the street, George and Leah Vukmir. Mrs. Vukmir, Leah is one of his, I understand now on leave, but when he had, when he was doing his WTMJ radio practice she was, I don't know what they call those people, she appeared once a week on his shows, it was a guest, whatever they call those people. So we have, Leah and I have on very rare occasions discussed her appearance. In that regard Leah is primarily an expert on educational issues. And our conversation in that regard, none of which has been recent, have centered primarily around those issues. I can't say exclusively on those issues. So I have no reservation about handling this case. That having been said I've convinced myself over the weekend that nothing more could possibly need to be said, but and I pledged myself that I wouldn't let any of you say anything, but I'm chickening out on that. If anybody wants to say anything else briefly let's have a rip at it at this point. You're the movant, Mr. Huston. Do you want to add anything? MR. HUSTON: I'm going to abide by your good faith weekend, your Honor. And request, if I may, if Mr. Ehlinger has something to say, if I may have a moment to think about it. THE COURT: That's fine. Mr. Ehlinger? MR. EHLINGER: Well, your Honor, I would have a great deal to say but it's all based -- it's all based upon things that are already in the record. And if I -- my, my calculated and wish I had something I would probably have the opportunity to say it on appeal because, as I understand the

appeal rules are such that I look at the same record before the court. One thing I do want to stress, Judge, is that although there was a suggestion in the defendants' brief to the contrary the burden of proof on everything except malice is definitely to the preponderance of evidence and that includes the burden of proof on falsity. The Goldwater versus Ginsberg and Rattray versus National City cases pretty much disposes of that. Rattray case was the only circuit that has decided the question, held that proof of actual falsity of allegedly defamatory statements need only be proved by a preponderance of evident. It says we adopt that, hold the requirement, that definition of plaintiff's proof. The actual falsity of statements by issue is clear and convincing evidence would only serve as a constitutional unnecessary barrier to recover. The only other issue, Judge, that doesn't address the facts in this case, which I assume is what the Court would like us to avoid talking about, has to do with the actual standard with respect to the malice, too. With respect to the malice the Court doesn't have to be convinced to -- by a reasonable or clear, convincing evidence; but simply has to use the standard summary judgment methodology to determine whether or not a reasonable jury could find inference in favor of the person against whom the motion is sought and interpreting all the evidence, all the credible evidence, it is favorably as a possibility that a reasonable jury could find that plaintiff had sustained that burden. MR. HUSTON: Nothing, your Honor. THE COURT: Okay. Okay. Let me start at the end and work backwards. I have concluded that none of the alleged defamatory statements with respect to the Whitefish Bay incident are actionable. With respect to the Stebane incident I'm virtually certain, although I want to take one more look at this, I'm virtually certain that I'm going to leave those claims pending. That they may, in fact, that there is, in fact , a, genuine issue of material fact with respect to those claims. As I said I had been hoping to get to one more look at Mr. McCann's article and Mr. Sykes' statements in regard to the Stebane incident again early this morning; I just didn't have sufficient time. So/but I had pretty much reached the conclusion over the weekend that there were genuine issues of material fact with respect to those comments and that article.

Just so, when and if any appeal's court looks at this, they know that I have tried to calculate where I'm at and what rules I'm bound by. As I indicated earlier I previously determined that Miss Schultz and The Animal Lobby are public figures. So we've gotten -- we do have the heightened burden of proof. With respect to defamation we have got four elements, false statements. With respect to some of these statements we've -- that is an issue, it's also noted in a variety of cases that the falsity of statements is closely related to the actual malice standard, communicated by speech or writing to a third person; that's not in dispute, tending to harm one's reputation. My view of the evidence is that it's not really in dispute. It's certainly not in dispute with respect to whether there is a genuine issue of material fact. In that regard I think, while I might quibble with one or two, I think the vast, vast majority, if not all of the statements that Miss Schultz feels were defamatory toward her and The Animal Lobby, there certainly was a reasonable view that would suggest that they were, in fact, harmful to her reputation or to the Animal Lobby's reputation and to the extent it was argued that they weren't defamatory by the Defendants I didn't see much merit in those arguments. Lastly, last element is that the statements were under privilege. They are, in fact, privileged under the first amendment. Unless a public figure can establish actual malice that standard of actual malice is phrased a couple different ways. But the phraseology that I have found more helpful was that they had to, again this is summary judgment, but I had to be convinced that a reasonable jury could conclude that the Defendant or employees of the Defendant who made the statement knew it was false or, in fact, entertained serious doubt as to its truth or had a high degree of awareness of probable falsity. I also take note of the fact that contrary to the normal summary judgment rules, that summary judgment is characterized as, because of the potential chilled effect on free speech and press resulting from protracted litigation, summary judgment is an important and favored method of adjudicating public figure defamation actions; that's from Torgerson. I guess I do agree with Mr. Ehlinger that, in fact, what I'm trying to do here is to apply, to evaluate summary judgment issues only applying the heightened burden of proof with respect to

the actual malice elements. Torgerson has sort of left us in the lurch on that issue. They had neither embraced or rejected the two Court of Appeals decisions which say that heightened burden is to be applied in summary judgment context. But given the fact that it was not rejected I think that that holding in Van Straten and Weigel is binding upon me. With that I have got a note to myself the fact that, succinctly put, what I am trying to determine is whether the Plaintiff has come forth with sufficient evidence from which a reasonable jury could conclude that actual malice is shown with convincing clarity. As I will note as we go along I have concluded with respect to, actually don't remember, at least one and I think two of the purported defamatory statements were, in fact, true. That they're not actionable on that basis. All right. Now, having said all of that I will go through the various statements upon which the allegations of defamation are based. And my analysis of those statements and statements and how the law applies to them, I have broken them down, I think, pretty consistently with the way the parties did in their briefs although not entirely so. My first category is what I have characterized as the category of condoning criminal activity. Now, I put into this simply, because I thought the analysis was pretty much the same, the allegations that it was defamatory to call it a felony. I have also concluded in this the allegations that defamatory statements were made alleging that Miss Schultz had engaged in a pattern of harassment of the Smiths prior to the taking of the dogs. I also included within this criminal conspiracy issue, although it appears in the briefs, that Miss Schultz and The Animal Lobby have abandoned their claims, those could be defamatory because of my prior determination that she, she and it were limited purpose public figures. I do not believe these statements are actionable for the following reasons with respect to condoning criminal activity. There is certainly a strong suggestion in the record before me that the allegedly defamatory statements are, in fact, true. That at a very minimal the statements are reasonable interpretations of highly ambiguous statements made by Miss Schultz herself under Torgerson, therefore, they are privileged and nonactionable. Now, Miss Schultz and The Animal Lobby attach greater significance to the facts that in making the

allegations that she had condoned criminal activity or arguably be apart to a criminal conspiracy that Mr. Sykes insisted upon calling that or characterizing that conduct as felonious conduct. Miss Schultz was not, in fact, charged with the felony and she certainly was never convicted of anything, felony or otherwise. But on the other hand at the time the statements were made she had not be charged and what she could or would have been charged with at that point was not something that could be and with any degree of certitude. I think it is clear that at best a reasonable jury applying actual malice standards could only conclude that was a reasonable interpretation of an ambiguous factual situation as was pointed out several times by the Defense in their brief. There are, in fact, arguabley felony charges available, 943.20(3)(d)(1). Mr. Sykes repeatedly asserted in deposition affidavit, et cetera, that he was using that term because he believed based upon information that he had with respect to the value of the dogs that the felony theft statute could be applied. Certainly given those facts and circumstances no jury could conclude to the requisite level that Mr. Sykes knew it was false or had substantial reason to believe it was false. And I want to be careful about that. I have sort of compressed those last two into what I characterize as substantial reason to believe that the statements were false. I also believe with respect to this issue about calling it a felony that it becomes nonactionable because it's substantially true or under the substantially true Doctrine of Rouch case and Simonson case which were cited by the Defense. Criminal conspiracy stuff. As I noted earlier, the Plaintiffs have abandoned this claim. I note only in passing that there is no conceivable way in my view that any jury could conclude that the requisite degree of certainty on the actual malice standard that Miss Schultz could, in fact, establish that element. There is a very reasonable view of the facts known to Miss Rhode and to Mr. Sykes that the Defendants, generally, if you will, that could lead a person to conclude that Miss Schultz was, in fact, involved in the conspiracy. Even if that is not true and she ardently takes the position that it wasn't, there is no reasonable jury to -- could conclude the statements were communicated knowing or having substantial reason to note that they were false. Pattern

of harassment. This one was more troubling to me. It is a fair analysis of what is before me and what was known or arguable known to, in particular, Mr. Sykes. This is a much closer call. But I still conclude that the Plaintiff could not meet their burden with respect to the actual malice standard and my basic rationale for that is as follows: The -- let me start by saying why I think it's a closer call. The facts known or relied upon by, in particular, Mr. Sykes, the -- making these assertions that Miss Schultz was involved in what I characterize as the pre-taking or pre-thefts, harassment of the statements are certainly not as evident or as strong as those relied upon in support of their suggestion that she was involved in the actual taking or post-taking conduct. But she has to prove actual malice, knew that it was false or substantial reason to believe that it was false. And I don't think a reasonable jury could reach that conclusion given just what she acknowledged. She acknowledged that she makes this call to the Smith home on the date of the actual taking. Now, what inference you draw from that and whether you call it a hang-up call or you don't call it a hang-up call, that is a fact that she acknowledges. She also acknowledged to Mrs. Smith and otherwise that she has be in contact with a group of people that for some mysterious sake I have characterized as the quote, "concerned neighbors," close quote. People who, the inference that one could reasonably draw as well, people who had engaged in sending a -- one effectively notable event is where the catalog is sent there with the circling of notations of the dog, of the dog wetter, dog coat, dog -- some type of article to keep a dog warm. I don't remember the specifics of it. She also acknowledged being involved in the post-theft relating of the dogs, if you will. Just on those facts and on the reasonable inferences that could be drawn from those facts I don't think a jury could reach the conclusion to the requisite level of certainty that Mr. Sykes knew or any other Defendants knew. And I think these allegations are primarily centered on Mr. Sykes. That those allegations were, in fact, false or that they had substantial reason to believe that they were false. And one, one of the ways that I tried to analyze that was that, you know, if I left that claim go forward and if the jury then reached the conclusion that those statements were defamatory

and that actual malice had been proven by the evidence in the trial whether I would take that away from the jury or not, whether I'll have to change that answer; and I reach the conclusion after struggling with it more significantly than I did with the other things. The conduct involved in the taking and the post-taking conduct I conclude that that -- an answer of that nature could not be justified by the jury and it would have to be taken away. Okay. Moving to a second category of statements, the primary one which is hang-up calls. But I have also included within this category the keeping of the dogs outside, the case solved statements and the breaking of the rank statements. I was a little bit frustrated by all of this because we spent a lot of time on it when I just didn't think there was much there at all. Starting with the hang-up call. She made this call to this home. She acknowledged that. She acknowledged that it was on the date that the dogs were taken. And it's a fact. It's a truth. The point that it upset Miss Schultz, that the Defendants in her view and I think probably in my view, obviously wanted this on the radio, on the listening public, to draw some damaging inference from that fact, inferences which she ardently maintained unwarranted does not make it actionable defamation. And that's whether you characterize it as a hang-up call or whether you categories it, I don't know how else you characterize it, but in case I'm wrong, in case there is a clear recognized and defining meaning, hang-up call including one Miss Schultz found on the Internet and in case the acknowledged facts surrounding this phone call to the Smith home fall outside of that technical definition of hang-up call; the statements are still privileged because there is no way under Torgerson that this could be characterize as anything other than a reasonable interpretation of them ambiguous facts. The doctrine which was cited repeatedly by the Defense in this case, keeping the dogs outside, again I didn't see much here in this regard. It's clear to me from reading all of this that Miss Schultz believes that the keeping of the dogs outside was a minuet portion of her basis for being concerned about the welfare of these dogs. But the reality is she complained about it. Neighbors complained about it. She complained about it to Miss Rhode. She complaint about it otherwise. The neighbors complained

about it otherwise. I just reference the fact that somebody sent the Smiths this catalog with the dog jacket, I got to get back, find the term for that -- but - MR. HUTSON: Blanket, your Honor. THE COURT: Dog blanket, thank you. That's it. You know they did complain about the fact that the dogs, that the dogs were kept outside purportedly under circumstances in which they shouldn't have been kept outside. The fact that Miss Schultz views and The Animal Lobby views that the Journal/Sentinel or Mr. Sykes put undue emphasis on this part of the -- the basis of their complaint is not in my view, makes this actionable defamation. Breaking ranks and case solved. Again I don't see much to that. It certainly falls within the parameters and a reasonable interpretation of ambiguous facts under Torgerson. And that being the case no reasonable jury could conclude that, that Miss Schultz and The Animal Lobby had established actual malice in the making of those statements. Grey Vans. Again I view this as a closer call. In fact, I'm always too blunt for my own good up here. But my law clerk and I disagreed about this one. I don't think, you know, I went and read Giwosky because that was the basic defense asserted on this motion by the Defendants. And I agree with the Defense here. I don't think that the pleaded statements identified Miss Schultz or The Animal Lobby directly or with sufficient inference to be actionable under the Giwosky case. And therefore, I didn't think it was actionable and the motion with respect to those statements needs to be granted. As I said this was a closer call. I had to read those over and over and over again because there are references and cross-references. We go from Weyauwega to Whitefish Bay. I think that Stebane may also -- has been thrown in there at some point. And it was somewhat confusing. But when I read for it about the third time I was convinced that I under Giwosky that wasn't actionable. All right. Now, the Fine campaign statements and the inference with contract. Again, I find myself firmly agreeing with the Defense as to what results govern this. The core of this inference with contract claims is the purportedly defamatory statements and calling it something different does not change the nature of claim or in my view the required analysis. Even if it did, and let me back up, calling it something different doesn't change the nature of

claim or the required analysis. And the Fitzgerald case which was cited by the Defense was particularly instructive in that regard in my view. Even if it changes the analysis that has to be made of what we're doing with it, it's still not actionable as interference with regard to contract because the conduct, the statements, in my view, are clearly privileged and therefore, they can't be a basis of a tortious interference claim; referencing the Civil Jury Instructions, 2780. And as I recall it's the last element necessary to prove such a claim. What Mr. Sykes stated about what Judge Fine should or shouldn't have done in terms of retaining or discharging Miss Schultz as his campaign manager are his opinions are privileged under the fair comments on the matter of public concern Doctrine of Grell. I think that is very, very clear. Now, you have got this other issue about the assertion that Miss Schultz had lied. And this is a different time frame, et cetera. And basically references a different controversy, if you will, probably should be careful utilizing this term, but I think that's fair. It's -- we have got the two controversies and I have talked about those the last time we were together. We have got the campaign controversy and we have got the dog-snatching controversy.

Mr. Sykes clearly, unequivocally asserted Miss Schultz had lied about the late filing of the finance report. I quickly concluded that Miss Schultz could never meet her standard of actual malice in this case if you juxtapose what she said to reporters as opposed to what Mr. Behrend, is that the treasurer? MR. EHLINGER: Mr. Behrend. THE COURT: Behrend says about why the report didn't arrived on time. You know, there is a very reasonable argument that what Mr. Sykes says is, in fact, true. And at the barest minimum what Mr. Sykes says is a reasonable interpretation of ambiguous facts. And Torgerson mandates that claim with respect to those statements be dismissed. According to my notes, be they right or be they wrong, I think that covers everything from Whitefish Bay slash Smith slash dognapping. I told you earlier and I do want to reserve those, the right to go back over this one more time. But I was very distressed by what I read about the Stebane case. What Mr. Sykes said about the Stebane case. What Mr. McCann said about the Stebane case. I have tentatively concluded that under a summary judgment

analysis even taking into account the higher standard for actual malice that, in fact, there may be a genuine issue of material fact with respect to those claims. There are some issues out there, sufficient identification, et cetera, but I felt after a first review of this that that is, probably survives this motion. I'll alert the parties by the close of the day on Wednesday whether I'm going to hold to that initial determination or whether a subsequent review has dissuaded me from that. It may be earlier than that. I hope to get back to that this afternoon. But I do want to, in fairness to everybody, I want to take one more look at it. Anything else? MR. EHLINGER: Nothing here, your Honor. You have covered it, your Honor. MR. HUTSON: You have covered it. THE COURT: It was hard not to. I don't think all of you made my wife's favorite list, I'll tell you that, because I was substantially tied up over the weekend and she was battling the six kids on her own much of the weekend. So okay. As I said, I'll get you a very brief letter decision about Stebane, the Stebane issues before the close of business on Wednesday. I choose Wednesday because if I don't get back to it today we've - we're picking a jury on tomorrow afternoon but then we're not taking any testimony on Wednesday because of the scheduling glitches that arose for the lawyers. So that well give me time on Wednesday. But I'll get to it this afternoon. Okay. Thank you everybody. MR. EHLINGER: Thank you, Judge. MR. HUTSON: Thank you, Judge. MR. KRILL: Thank you, your Honor.

(Proceedings concluded.)

STATE OF WISCONSIN)
(SS:
MILWAUKEE COUNTY)

I, June K. Teeguarden, do hereby certify that I am the Official Court Reporter for the Honorable Christopher R. Foley, Circuit Court Judge, Branch #14, Civil Division, Milwaukee, Milwaukee County, State of Wisconsin; that as such Court Reporter, I made full and correct stenographic notes of all the testimony in the above-entitled action, and that the proceedings annexed hereto is a true and correct transcript of the hearing at said time. I further certify that said transcript was requested by Attorneys Ralph Ehlinger and Paul Bargren by written request dated September 21, 1998, with said request being completed by me this 24th day of September, 1998.

s/June K. Teeguarden
June K. Teeguarden, R.P.R.,C.P.

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September 23, 1998

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Re: Schultz v. Sykes, Case No. 98CV000724

Via Fax and Regular Mail

Gentlemen:

After further review of the materials relating to the Stebane incident) specifically the McCann articles of the March 11, 1996, and a transcript of the Sykes broadcast of the same date), I have concluded that a genuine issue of material fact has been raised with respect to Ms. Schultz's and The Animal Lobby's claims that those communications defamed them. Therefore, the motion for summary judgment relating to those claims is denied.

Initially I note that the critical lack of evidence with respect to the element of actual malice, which doomed the Plaintiffs' claims with respect to the Whitefish Bay incident, is clearly satisfied with respect to these claims. Both Mr. McCann and Mr. Sykes admit they had no basis to believe that Ms. Schultz or the Animal Lobby were involved in the "staged execution" of the dog in the Stebane incident. The criticial issue as to these claims is whether the McCann article and/or Sykes broadcast could reasonably be understood to be defamatory, i.e., to directly state or imply that Ms. Shultz/The Animal Lobby participated in the "staged execution" at the Stebane farm.[1] Cf. Frinzi v. Hanson, 30 Wis. 2d 271, 276, 140 N.W. 2d 259 (1966).

The critical language of both communications is set forth at pp. 57-58 of the Plaintiffs' brief. The language used by Mr. Sykes clearly could be reasonably interpreted to state there was direct involvement or imply such involvement. While the language in the McCann article is somewhat more discerning, there exists a valid argument that a reasonable reader would understand it to state or imply direct involvement.[2] Since I cannot conclude that the communications were not capable of a defamatory meaning as a matter of law, a genuine issue of material fact is presented and the motion must be denied.

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[1]Any claim by Ms. Schultz or the Animal Lobby that these communications are defamatory be stating or implying that she approved of the "staged execution" would fail. The materials before me on this motion establish that plaintiffs could not meet their burden of actual malice in that such an assertion or inference could only be characterized as a reasonable interpretation of ambiguous facts. Hence, such a claim is not actionable under Torgerson.

[2]I find no merit to the defense argument that because Ms. Schultz proclaims herself to be an animal rights activist and that the "staged execution" was purportedly undertaken in the interest of animal rights, communications which implicate Ms. Schultz (or The Animal Lobby) in this activity could not be understood to convey a defamatory meaning. In my view, the communications clearly could be interpreted to meet the definition of a defamatory statement. Restatement, Second, Torts, sec. 559; Ranous v. Hughes, 30 Wis 2d 452, 460, 141 N.W. 2d 251 (1966).

My clerk will set the matter for a scheduling conference and will notify the parties accordingly.

Very truly yours,

s/Christopher R. Foley
Christopher R. Foley
Circuit Judge

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

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CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO.
98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

December 20, 1999 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

RALPH EHLINGER and ROBERT SUTTON, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER

BRANCH 17

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DECISION

THE COURT: Well, the question on summary judgment is whether or not the article by Dennis McCann and the statement by Charles Sykes are capable of a defamatory meaning. The question is not whether or not they might be capable of some other meaning. By way of defense, the defendant may well at trial try to imply that there was some other meaning intended by what was said. It could be that there are other ways to read this but on summary judgment the Court is also required to take inferences or draw the factual inferences in favor of the party against whom the motion is made, which is the party plaintiff.

I appreciate in a defamation case you have somewhat of a different animal because you got some serious first amendment questions involved. Summary judgment is a favored procedure to reach those questions short of a trial because of the potential for a chilling affect that these matters can have on free speech. So that it is slightly different. I still don't think we lose site of that basic rule of summary judgment that the inferences have drawn here which are the inferences that would favor the party against whom the motion is made. At one point in the defendant's brief they say that they really were honoring Cindy Schultz. That could be the meaning when you take it in the whole context of what Mr. Stebane was doing up there. The tone of the piece we just heard, although by Mr. Sykes was not expressed in respectful laudatory terms, I think nonetheless, considering the context, that may be an arrow that the defendants have arrow in their quiver. Again, you get back to the point that I conclude, that this is capable of a defamatory meaning. I am the fourth judicial officer to take a look at this. Judge Foley saw it first on summary judgment and then on a rehearing for summary judgment. The Court of Appeals saw it on a request on an interlocutory appeal. She was somebody active in managing campaigns. She was at the time I believe managing the campaign of Court of Appeals Judge Ralph Adam Fine for the Supreme Court. At the same time she was maintaining her high profile in animal rights, for which she has been denominated a limited purpose public

figure. As Judge Foley noted, there is sort of a melding of these two things together. What affects her in the animal rights arena I think has some spill over into how she is perceived in the other arena or could be in the estimation of a reasonable jury. I appreciate the bar is raised here with a finding that she is a limited purpose public figure. The standard becomes actual malice. Mr. McCann and Mr. Sykes acknowledge that they had no basis to believe that either Ms. Schultz or the Animal Lobby were involved in the staged execution of the dog in the Stebane incident. Judge Foley thought that fact was critical in raising a jury question as to actual malice. I think I would agree with that statement. I would agree with that finding. I further conclude that a reasonable jury could find that these statements would be reasonably understood to be defamatory. They would be implying or stating that Ms. Schultz and/or the Animal Lobby was involved, had something to do with what's been referred to as the "staged execution" at the Stebane farm. Mr. Ehlinger has submitted on behalf of the Plaintiffs numerous affidavits of persons who said that their estimation of her suffered because of the statement. I think that creates a jury question here. As for the involvement of the Animal Lobby, first of all the plaintiff, Cynthia Schultz, is closely connected with this lobby. She has been identified with it. In the period of just prior to the broadcast that was did in March, Mr. Sykes identified the Animal Lobby as being Cynthia Schultz's animal rights organization at least eight times. The defendant, Journal Company, Journal/Sentinel, in a series of articles in March of 1996, mentioned this fact and had linked Schultz with the Animal Lobby on five occasions. So that when they are referring to animal lawyers or animal activists, as the terms were used, a jury could draw the reasonable inference that they are talking about the Animal Lobby when those terms were used by Sykes and McCann. I think it was only Mr. Sykes that used the term animal warriors, if I recall correctly.
MR. EHLINGER: Your Honor?
THE COURT: Yes.
EHLINGER: Dennis McCann's quotation
was about Schultz and her animal warriors a few years ago.
THE COURT: Okay. I agree with Judge Foley also that

perhaps Mr. McCann was a little more circumspect. Judge Foley used the word more discerning. Maybe that is a better way to describe it. I think that there is a valid argument that a jury could take both of these statements to mean that both plaintiffs were directly implicated or involved in the sting operation with the Asian couple. There is also an argument that the statements here were more in the nature of commentary not statements of fact and certainly a comment on public figures is something that is subject to protection. It is protected by the first amendment. I conclude here that a reasonable jury looking at this could come to the conclusion that the statement that she is involved is not in my view a statement of opinion, but that it is a statement of fact.

MR. HUSTON: We agree with that, Your Honor.

THE COURT: I think that was probably the gist of the plaintiff's claim here, at least as I see it, that she was involved, her organization was involved and that involvement tends to lower her in the estimation of the community or at least at this point a reasonable jury could so find and the Court concludes for these reasons that the summary judgment motion of the plaintiffs should be denied.

MR. SUTTON: I think you said plaintiffs.

THE COURT: The defendants motion for summary judgment is denied. I thank you, Mr. Sutton.

Mr. Ehlinger, prepare the appropriate order, submit it under the five day rule with a copy to counsel.

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REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

) SS

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on December 20, 1999, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 10th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

January 21, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

ROBERT SUTTON, ALEX FLYNN and RALPH EHLINGER, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

*****

DECISION

THE COURT: All right. This hearing has been conducted on a motion brought by the defendants to dismiss this case. I believe the authority which had been brought into question earlier, the authority of the Court for conducting a hearing of this type, is set forth in Section 901.04(3)(d), which allows the Court to conduct hearings on matters outside of the presence of the jury and (d) refers to "any preliminary matter if the interests of justice so require." This court thought long and hard about whether to allow this hearing. I reviewed the submissions and after reviewing them decided that the only way this could be resolved was to have a hearing, to have the witnesses take the stand, have everybody in the chair to make observations about their demeanor, allow for the weighing of credibility and the other functions that a fact finder engages in. This is not a paper case that can come before court as say a summary judgment would where the Court does not go behind any of the documents that are submitted. In fact, if there is a dispute or a material difference on an issue of fact for trial in a summary judgment, the Court cannot determine it. That automatically knocks the case out of summary judgment. In order to make such a determination the Court would have to look at credibility. There is no opportunity to do that when everything is submitted to you on paper. It is a way in some cases to streamline things and avoid the cumbersome nature of a hearing with testimony and witnesses and all the rest of it. It does work in some cases, but I don't think in a case like this it could be handled in any other way but than to have the witnesses come in and give their testimony. Whether or not somebody is telling the truth or not telling the truth is not always readily subject to determination. It is not an easy thing to do. Throughout history various civilizations have tried to devise ways to tell whether somebody is telling the truth. Way back when, people walked through hot coals. If your feet weren't burned, you were telling the truth. We have come to, in our jurisprudence, we have come to the idea that we take oaths to tell the truth. We do that when there is testimony given by a fact witness here. We do that in affidavits that are submitted on summary judgment. Affidavits submitted in support of any motion are

always under oath. Attached to the oath is a certain significance that this is something that you can rely on because somebody is affirming, is swearing that the contents of the writing are true or that the entire testimony is true. Part of the reason that we have all of these trappings here, this beautiful room, a judge wearing a black robe, witness chair here immediately next to the bench, witnesses taking oaths, all the ceremony that goes along with it and the trappings of court proceedings is because of the premium that we place on the truth coming out in court proceedings. As I said earlier, it is not an easy thing to do yet it is done all the time. Everytime you have a jury trial, a jury does it. In fact, we give the jury an instruction on how to do it. We have a credibility instruction. It tells the factors to look for like the interest or lack of interest that a person has in a the result of trial, conduct and demeanor on the witness stand, bias or prejudice if any has been shown, the clearness or lack of clearness of their recollections, and their
opportunity for observing and knowing the matters and things given in evidence by them. Not all of those apply to every witness, but that covers a pretty broad water front and I think gives the jury or a finder of fact some things to consider when weighing testimony to try to determine who is telling the truth. I think I agree with Mr. Huston's statement early on in his argument that what this really boils down to here is who do we believe. Do we believe Clary Engel or do we believe Cynthia Schultz? According to Mr. Engel's testimony there were three occasions on which he was requested by Cynthia Schultz to give testimony that he knew to be false. The first occurred on or around July 30, 1997 during the pendency of criminal proceedings when he was mailed, under a postmark of July 30th, Exhibits 14, 15, and 16. This I will refer to as alibi testimony. That was the general subject matter; the dognapping alibi. The criminal case was subsequently dismissed around November of 1997, and in January of '98, the libel case which we are here on today was started. Sometime in the summer of 1998, the second instance occurs and it is alleged that Mr. Engel is at the plaintiff's home. Apparently he shows up unannounced or uninvited, but they do get into a conversation about this case and some notes are prepared in

the handwriting of the plaintiff suggesting testimony that Mr. Engel should give. Again, that is testimony that he has confirmed in his testimony here before the Court is not true. Facts contained in Exhibit 17 are not true. Also around that same time I believe also he was solicited to give testimony about his having heard a March 11, 1996 broadcast of defendant, Charles Sykes, on the radio and that he would be a witness attesting to the reputational damage accruing to the damage from that broadcast. The third instance or the third occurred around late morning or around noon of September 3, 1999 in a car parked in the parking lot behind Mr. Ehlinger's office where the plaintiff and Mr. Engel met and she said she had some new stuff she wanted him to look at. This material, according to Mr. Engel's testimony, went again to the issue of reputational damage. Mr. Engel comes before this court having been convicted of a crime on nine occasions. Those convictions are misdemeanors and felonies. There are at least three burglaries. There was one in 1985, one in '86, one in 1991. I take note of the fact Mr. Engel was born I believe in 1967. That would make him about 18 years old when the first burglary occurred. The dates of these on offenses range from August of '85 through May of 1991. That would be during the time while Mr. Engel was 18 until about 24 years old. He has had no convictions since the May, 1991 offense. These can't be ignored by the Court, but in looking at them I am struck with Mr. Engel's youth at the time that he committed these offenses and the remoteness in time of some of the offenses from today. I think remoteness in time is an appropriate consideration. I know there are rules of evidence under which the notes talk about the Federal rules. You can't use a conviction in Federal Court for the purposes of impeachment if it is more than 10 years old. So that the Federal rules maybe, to a greater degree than the State, allow for the possibility that a person can commit these offenses and there is a possibility of rehabilitation. In any event, the offenses bear on, to the extent that they are given weight here, they bear on the character trait of truthfulness or untruthfulness. I think they are one of the bundle of sticks that has to be considered, has to be examined together with other things. I don't think standing alone that they are enough to preclude acceptance of Mr. Engel's

testimony and particularly when other surrounding factors are examined. Mr. Engel's testimony finds corroboration in the record. There is corroboration first of all by Assistant U.S. Attorney Joseph Wall. I will call that dependent corroboration because it really is dependent entirely upon what Mr. Engel tells to Mr. Wall. Mr. Wall simply came back and repeated it. So that what Mr. Wall told us here in this hearing is dependent upon what Mr. Engel told him. What he told us did square with what Mr. Engel's testimony was. Mr. Wall is a Federal law enforcement official occupying a very responsible position. As a Federal prosecutor who is making quasi judicial decisions about whether or not to issue charges, I would say that probably on an almost daily basis he runs into situations where he has to make the kind of assessment that we were involved in here as to who is lying and who is telling the truth. He has to do that for the purposes of deciding whether or not a certain
charge should issue against an individual. So that I believe, even though that his corroboration here is dependent upon what he was told by Mr. Engel, it is of some weight and it is something to be considered. There is other corroborating testimony that I think is entitled to more weight and I would look at this more as independent corroboration. Those are the exhibits that I mentioned earlier, Exhibits 13 through 17, all of which were prepared by the plaintiff, Cynthia Schultz. These are in the form of writing the testimony that he was being asked to give by Ms. Schultz, which testimony he indicated would have been false had he given given it. I believe these documents also are important because it is undisputed that they were prepared by the very person who was alleged to have suborn the perjury. Also there is independent corroboration here by Barbara Manson and June Ellen Jones. They come to this situation as strangers prior to the events involved in this case. Prior to the events involved in this case neither of them knew the plaintiff or Mr. Engel. Certainly they have, like Mr. Engel, they certainly have nothing to gain by giving the testimony that they gave here. They are not going to be better off by giving it. So that there is not that kind of an incentive. There is not an interest in the outcome of the case, which is the first factor in Instruction 215. In fact, their lack of

interest in the outcome of this case tends to strengthen their testimony. The testimony given here by Manson and Jones corroborates and fits, dove tales, with the testimony of Mr. Engel. Barb Manson and June Jones obviously provide alibi testimony. They don't tell where Schultz was or what she was doing, but the series of phone calls that have been so much a part of this case all started on January 21st with a call by Ms. Schultz to Melanie Volk and then shortly after that a call to Barbara Manson. That was a very short call. It was around noon or a little after noon. Later that evening, around 9 or 10 o'clock, there was a half hour conversation that took place between the plaintiff Cynthia Schultz and Barbara Manson. June Ellen Jones had two conversations with Cynthia Schultz each of about a half hour duration. Ms. Jones also kept contemporaneous notes with regard to what was going on here with respect to the dogs and their progress. Both of these individuals also made statements to the Whitefish Bay police department and in fact reported the situation to the Whitefish Bay police department in March of 1996, shortly after the March 3rd article appeared in the Journal/Sentinel. So that what Mr. Engel has testified to has been borne out by and corroborated by exhibits prepared by the plaintiff herself and by the testimony of Ms. Jones, Ms. Manson and Mr. Wall. So that all of this supports what Clary Engel has said and certainly bolsters the weight that you give to his testimony. His testimony is independently corroborated in other portions of the record. All of the corroboration is by persons with nothing to gain or lose except for Ms. Schultz, who has most to lose and whose evidence is probably the most damning with regard to the subornation of perjury. I sense that Mr. Engel was somewhat of a reluctant witness and that he did feel an indebtedness to Ms. Schultz for what she did for his dog. In fact, he drew lines beyond which he would not go. He would not consent to be wired at an arranged meeting where he could record the testimony. He didn't like it. He talked to Joe Wall about it. Joe Wall affirmed his negative feelings, so he said I am not going to do it. So that I don't see here any type of a motive here that would guide Mr. Engel to give his testimony, say with some animus, toward Ms. Schultz or some other motive. There has been testimony here or there is in the record

testimony from Ms. Schultz about a $2,000 demand that was made on the morning of September 3rd. Strangely enough, that demand was not communicated by Ms. Schultz to her attorney. There was opportunity to do that on the way over to the evening deposition at the Foley & Lardner offices on September 3rd. There were certainly other opportunties if that demand had in fact been made. For reasons I will get into later, the Court frankly has serious doubts if the demand was made. It is uncorroborated in the record other than the testimony of Ms. Schultz. Mr. Ehlinger had some contact with Mr. Engel. I don't know that the record actually establishes that an office meeting between them took place, but they had at least a telephone conversation. Mr. Ehlinger did obtain information from Mr. Engel, which was set out as the basis for an affidavit which was prepared in opposition to a motion for summary judgment and which was filed by the defendants in this case. That affidavit was prepared but never signed. There was testimony at one point of Mr. Engel being at the Ehlinger law office around noon on a day when Mr. Ehlinger was tied up in depositions. Mr. Engel could see a number of people in a room with some proceedings obviously going on and he begged off waiting around for Mr. Ehlinger with an excuse that had something to do with him having to tend to his daughter or something, which he testified to was simply a reluctance on his part to sign the affidavit because he knew if he signed it he could be committing perjury. Mr. Engel doesn't have a clear recollection of their conversations and this information changing hands, but I am confident in the record that such a discussion did take place. I think at the end of the day what it demonstrates is that when push came to shove, Mr. Engel was not willing to sign an affidavit that he knew was untrue. Moving to the testimony of Cynthia Schultz. She is the person with the most to gain or lose in this case. So that her interest or lack of interest in the result of this trial also is a salient factor. She is very interested in this case. She is interested in how it comes out. She stands to gain or lose by what is said. I believe that is an important factor here. Her conduct and appearance on the witness stand I think is also a factor here. She gave this court the impression of evasiveness on some occasions. She was unwilling sometimes to agree to

answer questions to which the answers were fairly obvious, like whether something was consistent with something else when all of the facts were laid out as an example. At one point she didn't know if the time of the 10 minute telephone conversation from June Ellen Jones' house on March 4th was consistent with the time the fax was sent with the 2:56 time imprinted at the top on the same date. She didn't know if those two things were consistent or not. She was unable to say. Sometimes she avoided questions posed by answering other questions. She, on some occasions, verbalized long answers to questions that had an easy yes or no answer. I gave her a couple of times my standard talk about being in the Army, about when you are in the Army you never volunteer and when you are a witness you never volunteer because it is just like being in the Army. That in and of itself is not a critical, crucial factor, but it is in the bundle of sticks that you have and you have to look at each factor and consider it. Also as to some questions she seemed to duck questions by what I can only describe as feigned confusion as to what the question was and then the question would be repeated. So that in overall she did not give this court the impression of one who was forthcoming about their testimony, who wanted to aid in the search for truth. Sometimes she was down right disingenuous in some of her answers by saying for instance that she never thought of Clary Engel and her sister as alibi witnesses and that is why she didn't tell Detective Staudacher about them. She knew she was under suspicion at the time for the dognapping. You would think she would want to tell Detective Staudacher everything that she had favorable about her case, all of the favorable facts. She had two alibi witnesses. You would think she would have made those known early on. At another point she said she didn't care what Melanie Volk testified to regarding the chain of custody of the dogs. That doesn't ring true and especially given Melanie Volk's position in this case as the pivotal person to receive the dogs out in Madison, the first person to have anything to do with those dogs as far as any of the evidence indicated here outside of Milwaukee County. If she didn't care what Melanie testified to, why would she tell Melanie on page 1 of Exhibit 26, the first page: "If they ask if you have talked to me, it would be good if

you told the truth that we talk all the time but not about how you are to give your testimony." In other words, don't tell them about how you are to give your testimony. That statement has other implications and raises other issues too. In her testimony at one point she is insisting she didn't care what Melanie testified to and on the other occasion she is telling Melanie don't tell anybody what we talked about in your testimony. There is a disconnect there. I think on occasions Ms. Schultz exhibited what I call a convenient memory. I think that goes to the clearness or lack of clearness of recollection. She could be very unclear as to a number of subjects and then very clear on others. I suppose that in and of itself doesn't mean anything because your memory could sometimes be cloudy because something is farther back in time or whatever. As an example here, when posed a question premised on Melanie Volk's deposition testimony, she answered Melanie Volk never said that and it is in her testimony. She had recall of the contents of Melanie Volk's deposition. She had it at hand. Yet a couple questions later, this is around page 10 of her testimony on January 12th, a couple questions later she has no recollection of Barb Manson's testimony the previous day on the very same point. She didn't remember what Barb Manson said. Maybe she wasn't listening when the question was posed. I don't know. That happened on a number of occasions. I just cite that as an example. None of these things that I have said, certainly standing alone, are any type of a litmus test or infallible sign of whether or not somebody is telling the truth or not. I think again, when you take the bundle of sticks and put them all together, there does seem to be an inescapable conclusion that the plaintiff was not being truthful. Another instance here is on Cindy Schultz's testimony regarding Barb Manson where she said on the 13th of January, around page 115, that she has never met and doesn't know Barb Manson. She also added at one point that she doesn't believe in dog shows, which is what Barb Manson is involved in. She shows dogs at dog fairs or dog shows. Having said she has never met her and doesn't know her, yet she says at page 112 that she made inquiries about her "even before the Gordon Setters were involved" as to her dog handling practices. Why would the plaintiff make

inquiries before the dognapping incident about someone she never knew or met who was involved with dog shows and dog fairs, which she, the plaintiff, doesn't believe in? Why would she do that? It doesn't make sense that she would be making such an inquiry at all and much less making them about a person she never knew and never met at a time prior to the dognapping. It doesn't ring true. Taking her at her word that she had done some background checking on her before the date of the dognapping and she didn't know or had never met her, why would she deny, on January 21st, 1996, four days after the dognapping, placing two telephone calls to this woman who she didn't know and had never met and she had come to learn was into dog shows and dog fairs which she didn't like and she didn't like the way she handled animals? She said she drowned her puppies. Why would she place a call to this woman immediately after talking to Melanie Volk on January 21st and then place another call to her at which time there was a half hour conversation around 9 p.m. on the same date? The only plausible explanation in the Court's mind is that the plaintiff and Barbara Manson talked about the dognapping and the dogs and further that plaintiff got Barbara Manson's name and telephone number from Melanie Volk in the course of their earlier telephone conversation that same day. Melanie Volk denies this and the plaintiff denies this, yet that stands out as the only plausible, reasonable inference from these undisputed facts and telephone records. The plaintiff has vigorously denied any attempt to suborn perjury here, but taking her testimony and the documents that she has prepared, the exhibits that she has prepared which are in this record, standing alone they would support that she perhaps did suborn perjury. The transmittal that she sent to Clary Engel, which is in the record as Exhibit 14, very cryptically says "Clary: Study this stuff. Do not show it to ANYONE" (all caps) "not even my attorney." It is mailed to Mr. Engel in an envelope marked personal and confidential. Why wouldn't she want her attorney to know about what was in these questions and answers? Also within the questions themselves is a, this is Exhibit 15 at page 5, there is a category entitled possible D.A. questions. Number 1 is "Did you talk to Cindy about your testimony?" Answer in all caps is "NO." Well, she

admits in her testimony here in the trial that she did talk to Mr. Engel about his testimony and that she simply took down his questions and answers and that is what is in this exhibit, but she doesn't want him to tell that to the District Attorney. Question No. 2, "Did you talk to anyone about your testimony here today?" Answer is "NO." Same thing. So that taking the plaintiff's testimony, Cynthia Schultz's testimony at her word that she did talk to Mr. Engel and prepared this as a result of conversations with him, she is asking him, by giving these answers, to testify to things that are not true. So that the court concludes, looking at Mr. Engel's testimony and also the testimony of Mr. Wall, Ms. Manson, Ms. Jones, the exhibits that I have a looked to, evaluating the credibility of the testimony given by the plaintiff, her conduct and demeanor on the witness stand, the clearness or lack of clearness of her recollection, interest or lack of interest in the result of this case, the Court concludes that she did seek to suborn perjury from Clary Engel. We have an adversarial system here. I mentioned earlier how we place a premium on the truth and how we have in this adversarial system certain rituals we observe and we have places like this where testimony is held, all of which which are meant to instill in witnesses the importance of telling the truth. Suborning perjury is something that goes to the heart of our justice system. It is an attempt to tilt the scales in one's favor with manufactured evidence. Our justice system I think is a very fragile entity. We are reliant on the trust and confidence of the public. People need to know that when they bring a case into court that win, lose or draw the rules were followed. They need to know that they got a fair shake. They may not like the result, but at least they feel they had their day in court. I think that sometimes there is something cathartic to having your day in court. You get a chance to get it off your chest in front of a judge or in front of a judge and a jury. It is certainly a preferred method of dispute resolution than dueling pistols at the old oak tree at dawn. We have carefully prescribed rules of evidence and procedure so that in many ways it is a form of combat according to carefully prescribed rules. I think courts have to always been diligent to continue to preserve and merit the trust and confidence which has been placed in them. The

integrity of our system needs to be maintained. People need to know that they are going to get a fair shake when they come to court. This trust in comity is like losing trust in a person. Whether it's a friend or a spouse, if you have been let down on some very important matter it is not something that is easily replaced. It does damage to a relationship. I think the Courts have to be sensitive to that and have to be alert to the fact that they have to ensure that what they do is done according to the rules and it is done fairly and that they demonstrate that the trust and confidence that has been placed in them is deserved. If they do not do this, I think their effectiveness as an impartial forum for the resolution of disputes is going to be compromised. There is developed a common law doctrine of inherent powers that resides in a court. These are powers that are an to adjunct to the powers granted a court by the constitution and by statutes. They are described by the Circuit Court of Appeals for the Fifth Circuit in the Nasco case, 894 Wis. 2d 696 at page 702. The inherent powers is "not a broad reservoir of power, ready at imperial hand, but a limited source; an implied power squeezed from the need to make the Court function." The United States Supreme Court in the Nasco case, which is cited in the plaintiff's brief, refers back to the U.S. Supreme Court case of 1812, The United States v. Hudson, 11 U.S. as follows: "It has long been understood that certain implied powers must necessarily result to our Courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others." What these are essentially are powers that a Court may be required to exercise in order to allow the Court to continue to do his job, to continue in its role. The doctrine of implied powers has found some support in the appellate decision of this case. The defendants have cited the Allis-Chalmers case at 162 Wis. 2d page 261. That case involved essentially the authority of the Court to control its calendar and to require if a showing of egregiousness is made, that a case can be dismissed because of delay, because it is just not moving along on the calendar. The case wound up being dismissed for violation of pretrial orders of the Court. The Court in Johnson v. Allis Chalmers noted that the Court has statutory authority and inherent authority

to sanction parties for failure to prosecute and comply with procedures, statutes, rules, or for failure to obey court orders. That's not quite our situation here. We are suborning perjury. There is no order in any scheduling order or pretrial order that a party shall not suborn perjury, but the Court imposed the sanction of dismissal without regard to whether the party whose case is dismissed bore a personal responsibility for the noncompliance of their attorney. Dismissal was recognized as a harsh sanction imposed only in extraordinary circumstances where the offending party's conduct is egregious. There is also the case of Chevron Chemical v. Deloitte & Touche at 176 Wis. 2d 935. That case in part relies upon or favorably cites the Johnson case. Here our Supreme Court approved sanctioning a party for conduct of counsel during a trial. The conduct of counsel was found to be unprofessional, egregious, flagrant and included sanctioning of counsel for violation of times in discovery, violation of sequestration orders, mischaracterization of contents of exhibits, intentionally misrepresenting availability of a witness, improper argument and comments made in front of a jury. I don't know if I put the cite in the record, but it can be found at 176 Wis. 2d 935. What the Court did here was approved taking away of a jury verdict against the offending party and ordered a judgment entered against the offending party with damages to be determined upon a hearing before the trial court. They actually reversed the jury verdict and ordered that the damages be found and entered a judgment against the offending party. The court in this case makes specific mention of the fact that courts have statutory and inherent authority to impose sanctions for failure to obey Court orders. The purpose of sanctions is to penalize the offender and to deter future misconduct. There is one other Wisconsin case I would like to mention in this regard and this one has to do with dismissal as a sanction where there is intentional spoliation of evidence by a party. The name of the case is Garfoot v. Firemen's Fund Insurance. The cite is 228 Wis. 2d 707. It is a 1999 Court of Appeals decision. Here the technician hired by the plaintiff's engineer disturbed evidence at the site of a gas heater explosion.

MR. SUTTON: Your Honor, I don't mean to interrupt, but can you give me an estimate of how much longer you are going to

be?
THE COURT: Probably about 10 minutes.
MR. SUTTON: I have a number of people waiting for me at Quarles & Brady.
THE COURT: Okay. This technician disturbed evidence that would have either proved or disproved the plaintiff's claim that a leak in the piping system caused the explosion. As a result of the technician disturbing items, it was unable to be proven or disproven. It was remanded to the trial court for a finding as to whether or not the conduct involved was intentional or not. It was noted that a dismissal of claims as a sanction for destroying evidence is appropriate where there is a conscious attempt to affect the outcome of the litigation or there is a flagrant knowing disregard of the judicial process. This case like the other two that I have cited here, the Johnson case and the Chevron case, provide for entry of a sanction under these circumstances without necessarily a showing of prejudice. It is not a condition precedent for a dismissal. The Court noted in Garfoot that the destruction of evidence could be a fact to be considered, but you don't have to show that the other side was prejudiced by what happened. That same thread runs through Chevron and through Johnson. So that I agree with Mr. Sutton. I don't find any Wisconsin cases on this point. Fortunately, this is something that does not happen very often. This is the first time this Court has ever been involved in a motion of this type. I must also note Garfoot makes no mention of inherent powers, but they don't give any authority for the exercise of the power to dismiss. I conclude that it cannot be anything other than the inherent powers of the Court. They cite three cases. When you look at the three cases, it is not based on any statute. I think it probably boils down to the same thing. So that I think these three cases stand for the proposition that where there is a showing of egregious conduct by a party or by a party's attorney or by the agent of an attorney, technician for an engineer in the Garfoot case, that dismissal may be appropriate. Dismissal is a harsh remedy. Unquestionably it's the ultimate sanction, but the offense here is a serious one. It boils down to an attempt to commit a fraud on the Court. Most disturbingly it appears to be a pattern. There are at least three incidents where it occurred; July '97,

July '98, and then again on September of '99. I think it does, contrary to the plaintiff's view here, I think it does go to the issue that is still of moment in this case. As has been pointed out here on several occasions, the dognapping charges or the libel complaint based upon the dognapping charges has been dismissed, but the defendant indicated that the dognapping charges would be an important part of their defense here because it was in the context of the heavy reportage and prominence given to the dognapping charges that the surviving claims arose. The dognapping charges were at the time receiving heavy play on Charlie Sykes' program and in the papers. There were several articles here that are in the record; newspaper articles on the subject. So that the defendants were taking the position at trial that if there was damage that occurred here, it was because of the dognapping and that was going to be a part of their defense here; that it was the dognapping charges that caused the reputational damages to the plaintiff and not the Stebane sting operation, which she was linked to and which the Court deemed survived summary judgment motions. So that the issue of the dognapping is still in this case for the purposes of a trial and the defendants were going to do that in order to give context to the surviving claims. Given the fact of this pattern of three instances here, which the Court has found there was an attempt to suborn perjury, and given the fact also that this goes to the very heart of the judicial process, which is the system of justice that we have here, that we administer, with its emphasis on telling the truth, and the desire of the justice system and the need of the justice system to maintain the confidence and the trust of the public and take steps necessary to maintain its integrity, the Court concludes that the conduct of the plaintiff, Cynthia Schultz, in attempting to suborn perjury merits dismissal of her complaint and the Court orders the complaint dismissed upon its merits.

MADAM CLERK: Costs, Judge?

THE COURT: Costs according to statute.

MR. SUTTON: Is that it?

THE COURT: That's it. I would ask, Mr. Huston, that you draw the appropriate order, submit it under the five day rule.

MR. HUSTON: Your Honor, I will. I withdraw my request to submit findings of facts and conclusions of law because it would be gilding the lilly. I also would like the file at this moment a motion for attorney fees under Section 814.025 and ask Your Honor to schedule proceedings on that motion.
THE COURT: All right. That should be filed with the clerk and then the proceedings would be scheduled in due course.
MR. HUSTON: Thank you.

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REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on January 21, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 10th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

February 29, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

ALEX FLYNN, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

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DECISION

THE COURT: The defendants are seeking attorneys fees as a sanction for the conduct of the plaintiff, Cynthia Schultz, in this matter and they offer two theories upon which she ought to be held liable. The first is that the attempt to suborn perjury uncovered or disclosed the fact that the current claims were frivolous and that they were subject to a truth defense. The second is that in the exercise of the inherent powers of the Court, there ought to be a sanction imposed upon the plaintiff of payment of attorneys fees for her actions in suborning the perjury. I would like to deal with the frivolous argument first. As everybody is aware, the complaint in this matter was voluminous and there were some 78 claims which were dismissed by Judge Foley on a summary judgment motion in September of 1998. Those in the main related to the theft of the two Gordon Setters from a home in Whitefish Bay, which I will refer to as the Whitefish Bay dognapping. Judge Foley granted summary judgment of dismissal as to those claims. The surviving claims, two in number, related to the Stebane sting operation to which Judge Foley found and this court affirmed a similar motion that a reasonable jury could find that the statements about the plaintiff, a limited purpose public figure, could find that that could rise to the level of actual malice. If there had not been a finding of attempt to suborn perjury, the claims arising out of the Stebane sting would have been tried. This court would have heard those. So that complaint, that claim in and of itself and on its face, I don't believe is frivolous. Two circuit courts have looked at it closely on summary judgment. I believe in between that time it had been up to the Court of Appeals where a review was sought by the defendants. Those claims received close scrutiny on three different occasions. I think the surviving claims have to be considered as part of the analysis here. The question then becomes what of the dognapping claims. I meant to state some of this at the outset but I neglected to so I am going to state it now. Courts of law with respect to frivolous claims, frivolous motions have been evolving. We have a statute 814.025, but the jurisprudence in this area has been evolving over the last 25 years or so. Case law makes it clear that it is not something

that is to be done by a court lightly. Generally courts are to presume that actions are not frivolous. Parties don't file frivolous cases. That is Kelly v. Clark at 192 Wis. 2d 633, at page 659. Furthermore, where there are doubts as to whether a claim is frivolous or not, those doubts should be resolved in favor of a finding that a claim is not frivolous. That's Stern v. Thompson & Coates, Ltd at 185 Wis. 2d 220 at page 235. Judge Foley found that the defendants' reporting on the dognapping was constitutionally protected and that finding is buttressed on two other findings. The first is that the plaintiff was a limited purpose public figure. The second is that a reasonable jury could find that reportage and publication was done with actual malice. The defense nonetheless intended at trial to use the facts of the dognapping as part of their defense arguing that the dognapping coverage minimized any damage from publication of the Stebane sting material. This was gone into in some detail at the hearing in a number of articles that were published and portions of transcripts from the Sykes' radio program. The defense was going to be that the references to the Stebane sting were buried away, if you will, or embedded in the reportage on the dognapping coverage and that if the plaintiff was damaged, it was because of all of the publicity with respect to the dognapping coverage and not from the statements about the Stebane sting. Clary Engel was solicited to provide a false alibi with respect to the dognapping and also to help buttress the plaintiff's claim for reputational damage. He was to testify that he heard the radio program where the reference was made to the Stebane sting and that his estimation of the plaintiff was lowered as a result. As I recall the record here, there were a number of other persons on the plaintiff's witness list who were going to be coming in to give similar testimony to that. The plaintiff did not intend to rely on Mr. Engel for all of the reputational damage testimony. It was also going to come from others. The defendant cites the case of State v. Amos, which states that suborning perjury can be taken to be evidence of consciousness of guilt. The reason somebody goes out and solicits false testimony can be offered as evidence of consciousness of guilt. Although I think other inferences are also possible, that is one possible inference. I think there also can be an attempt by the plaintiff in this case

to buttress her case. The suborned perjury here does not in the Court's view show that the plaintiff committed the dognapping. The guilt with respect to the dognapping does not in the Court's view necessarily follow from the fact of the attempted surbornation of perjury. It certainly raises serious questions and has raised serious questions with this court which we have gone into in earlier decisions. It can be taken as evidence of guilt. As the special prosecutor pointed out in the criminal case, there was some changed testimony on critical points in the case. One of them was, as I recall, it was the testimony of Melanie Volk. Melanie Volk, notwithstanding the plaintiff's protestations to the contrary which were explored somewhat by the Court in its earlier decision, was critical here. She was the link with respect to those dogs going from Milwaukee to Madison and then from there onward to Barbara Manson and June Ellen Jones. Melanie Volk said that a man in a ponytail driving a Chevy blazer delivered the dogs. The plaintiff wasn't put in the chain. Interestingly, she had knowledge of the whereabouts of the Gordon Setters. There is the fact of these phone calls going on of talking to Melanie Volk shortly after the dogs were dognapped. Shortly after talking to Melanie Volk there was an attempt to call Barbara Manson. There was a short conversation there. Later in the evening that very same day she talked to Barbara Manson for about a half hour. These phone calls are there and they certainly raise some suspicions as to the involvement of the plaintiff in this offense. There is an odor emanating here. In light of the Court's findings on the plaintiff's credibility here, I don't know that the Melanie Volk conversation was all girl talk for a half hour or 45 minutes on that day. It was a lengthy phone conversation between the two of them. Taking the case law about the hesitancy that a court should have to find a frivolous action and that the presumption should be the other way, that parties don't file frivolous actions, I conclude that in the words of one of my former colleagues George Burns, who always had a saying for everything that would sum it up in a very nice, terse manner, that this is, at this stage at least, a brook too wide for leaping to get over to the frivolousness from this. This was a hearing at which the issue was whether or not there was an attempt to suborn perjury not whether

plaintiff was guilty of dognapping. A different issue, a different focus, a different investigation necessarily would have had to be conducted. This is admittedly a close question, a very close question. I certainly have some suspicions here on the plaintiff's involvement in the dognapping, but suspicions are not enough. It is disturbing to me that with the phone records that there were, with the testimony of Clary Engel, the testimony of June Ellen Jones, the testimony of Barbara Manson, the testimony of Joe Wall, Exhibits 15, 16 and 17 that were typed by the plaintiff which were clear instructions as to what Clary Engel was to testify to, that the plaintiff's fingerprints are all over this. Cindy Schultz's attempt to suborn perjury from Mr. Engel, one of the attempts, there were three that were found by the Court, but one of them was during the pendency of the criminal action. It was in the summer of 1997 while the criminal case was pending that she first requested Mr. Engel to give testimony. This is testimony that would have been given in her criminal case had it gone to trial. That is when he received the typed sheets. Melanie Volk received instructions, terse instructions on an exhibit. The number doesn't come to mind. It was something to the effect you can tell people we talked about stuff and we talked, but don't tell them we talked about how you were supposed to give your testimony. I didn't find an attempt to suborn perjury there with respect to Melanie Volk but there well could be one. Suggesting that her testimony be something other than truthful again is tailor-made testimony to try to tip the scales. We are not here on an investigation of a criminal matter. That is the province of the District Attorney's office. All of these things in the Court's mind raise a question as to whether or not the District Attorney should perhaps take another look at this and perhaps there should be a referral back in light of Clary Engel's testimony in this matter, in light of Joe Wall's testimony, in light of June Ellen Jones' testimony, in light of Barbara Manson's testimony, and in light of the plaintiff's instructions to Melanie Volk about her testimony. Inasmuch as the meeting with Clary Engel took place during the pendency of the criminal proceedings and there was an attempt here to suborn perjury by Clary Engel in a criminal case, I think the District Attorney ought to know about this. It

may change his view with respect to prosecution. I don't know. That is his call. He sits in a quasi judicial capacity and determines the appropriateness of the issuance of criminal charges. That quasi judicial prerogative allows the District Attorney to issue or to decline to issue charges. Sometimes they may decline to issue charges, but the District Attorney is allowed, sitting in a quasi judicial capacity, is allowed some considerable discretion in that regard. That is a discretion that certainly this court would not interfere with, but I do think this court is bound, when it comes across matters such as this which reflect an attempt to tip the scales in a litigant's favor by suborning perjury, I think that the Court is bound to give the evidence of that over to the appropriate authorities and they can examine it and do with it as they deem best. I believe that the decision of the Court here on this matter ought to be referred back to the District Attorney to be looked at anew with respect to the plaintiff's conduct during the pendency of these criminal proceedings. The Court is going to order that a transcript of this decision here today, together with a transcript of the earlier decision made back on January 21st be forwarded to the District Attorney. With respect to the other prong of liability here that has been argued by the defendants. I believe the reasoning of the Court in its decision on January 21st should to be adopted here and I do adopt it in this case. I make that all a part of the decision here. Additionally, other authorities have been cited by the defendants as a basis for the imposition of attorneys fees in these circumstances. Particularly there is the Schaefer case. I believe the Schaefer case dealt with a similar circumstance. In fact, the attorney in that case withdrew on the day of trial because of an attempt to suborn perjury. Although I think it boiled down to in the end the question of an assertion by the insured of breach of a duty to cooperate under the cooperation requirement under the policy, and that is what the Court spent a lot of time discussing, but there was subornation of perjury with respect to who was driving that truck. That was eventually the basis for the finding that attorneys fees were appropriate as a sanction. The Court of Appeals in Schaefer noted at 182 Wis. 2d, 148, and this is the Court of Appeals talking at page 163, "while a Latham and Johnson discuss the trial court's inherent

authority to dismiss an action as a sanction, we conclude that the Supreme Court's discussion is equally applicable to a trial court's ability to discuss attorney fees as a sanction." So that I think the conduct in Schaefer for each of the sanctioned parties closely parallels the conduct that was found to have occurred by the Court in this case. This court believes that it would be appropriate as a sanction that the attorneys fees that have been incurred by the defendants in connection with the discovery, investigation, legal research, trial on the issue of suborning perjury, and by my reckoning that goes back to at least the August 24, 1999 meeting in Mr. Huston's office, I think Mr. Bargren was there, Mr. Wall was there, Clary Engel was there, but I think that is when all of this starts. That is when it first comes to the attention of the defendants that this conduct had been going on and that the legal services that the counsel for the defendants had provided from that time forward as it relates to the subornation of perjury, together with their costs incurred, expert witness fees, copying costs, all costs that are reasonable and necessary for the prosecution of their motion. I know the issues were briefed extensively and a lot of time was spent on legal research, so that I believe as and for a sanction the plaintiff ought to be responsible for those fees. As noted in the Chevron Chemical case, this is both to penalize the offender and also to deter future misconduct. Also I think there is some equity that comes into play here as an additional consideration because it does not seem equitable or fair to this court that the defendants should be burdened with the costs of litigating an issue wherein the plaintiff attempted a fraud on this court. She didn't complete the fraud, as Mr. Flynn said, but I don't think this is a no harm no foul situation. If you look at some of the case law in this area, I am thinking of Johnson v. Allis Chalmers, they say that prejudice to the other side is not something that needs to be shown. Whether or not the parties were prejudiced by what Clary Engel did, the fact that there was merely an attempt and therefore actually no actual prejudice occurred will not lie as a defense. It's conduct which goes to the heart of our system. I think I spent a lot of time back in January talking about how reliant we are on parties coming to court, witnesses coming into court and telling the truth. That is why we have all of the solemnity that we have

here with in our proceedings putting witnesses under oath. This room exists I think in large part for that reason. When a witness comes into court to give testimony, this isn't a casual event. The solemnity is put in the proceedings at least in part to instill in witnesses the importance of telling the truth. When the plaintiff attempts to manufacturer evidence, tilt the scales, commit a fraud on this court and in so doing causes considerable financial costs to the party opposed who has then the burden of first of all discovering it, then investigating it, doing the necessary legal research, preparing briefs, filing a motion, raising this matter, spending five days in a hearing, I don't think that I have covered all of it, and other associated costs with this, I think it is equitable, it is fair that the defendants who together with the Court have been wronged by this conduct should not have to bear the financial burden of having brought the matter before the Court for a decision. That this is one of those instances, as discussed by the Court of Appeals in the Schaefer case, where the imposition of attorneys fees as a sanction within the Court's inherent power is appropriate. So that I know you have submitted a complete statement here, Mr. Huston, already. It is in chronological order. I would ask that you draw through that statement, consistent with this decision then, and resubmit something in a format that would be tailored to what we have done here today and then we would consider that.

MR. HUSTON: Okay, Your Honor. Will you be hearing evidence on the reasonableness and so forth? I am trying to think about how to go forward. We can isolate the costs associated with Your Honor's decision very quickly this afternoon, if necessary, since we were prepared to go forward with evidence today and tomorrow. I would like to stay on that schedule if it meets the Court's convenience and so forth.

THE COURT: We could come back tomorrow morning and we can continue on with this hearing. I guess left to determine here would be the determination with regard to legal rates, hourly rates, and then the reasonableness and necessity of the services and their associated costs to their relevance to the issue here.

MR. FLYNN: I have got a question, Judge, if I could. The ruling is for the fees and costs necessary to bring this motion

to dismiss?
THE COURT: Reasonableness. It would also include the fees and costs in providing their billings to the Court. It would include, I would guess, if there be an appeal on this and the Court of Appeals would sustain this Court's decision, I would expect that those costs and attorneys fees would continue. As long as this issue is alive, until there is a final judgment entered from which no appeal is taken, it would be the intention that those attorneys fees and costs necessarily incurred with respect to the suborning perjury issue would be the responsibility of the plaintiff.
MR. FLYNN: But there can't be an appeal without an order.
THE COURT: There has to be an order. We have not gotten to that point yet. I am sort of trying to respond to your question as to what is included.
MR. FLYNN: Okay. Fees and costs associated with bringing the motion based on the subornation of perjury?
THE COURT: I think I said more than that, but what you said would be included yes.
MR. FLYNN: That goes back to August 24th of 1999.
THE COURT: I think that is when this matter first surfaced. Mr. Huston is nodding in agreement. I think we are all on the same page.
MR. FLYNN: Then as I understand it, I am going to be getting a broken down assessment of this afternoon sometime?
THE COURT: When do you think you would be able to do it, Mr. Huston? Would it be reasonable before the close of business today?
MR. HUSTON: We will go back and try to do it as rapidly as we can. I believe we can get it done before the close of business today. It is not an enormous problem. If I understand Your Honor correctly, the post January 21st costs are included in your award?
THE COURT: Yes.
MR. HUSTON: That is only for this purpose. Between August 24th and about December 20th we also incurred some costs to get ready for trial. All we have to do is back those out as best we can. I don't think it is a daunting problem. I would hope to be able to give to Mr. Flynn by the end of the day today a report of what we think those fees ought to be for that period.

If we fail, we fail. We will get it to him, if we have his post 5 p.m. location, we will get it to him wherever he is even if it has to be after 5 o'clock.
MR. FLYNN: Obviously the cost relating to bringing the frivolous motion was denied. Those costs will be backed out as well? This is for sanctions and not for frivololousness.
THE COURT: Well, --
MR. HUSTON: May I be heard on that point?
THE COURT: Yes, Mr. Huston.
MR. HUSTON: We brought this motion on two prongs which were frivolousness and as a sanction. That is all together. We didn't write one brief on sanctions and one brief on frivolousness. We cannot isolate the cost of bringing a motion based on frivolousness from the cost of bringing a motion based on the sanctions for perjury. From January 21st forward, the only thing that we were doing in this case was to prosecute our motion for fees on one ground or another. So based on Your Honor's reasoning a few minutes ago, I would ask that all the fees from January 21st forward be included as an award.
MR. FLYNN: That is an additional request. The Court has made a ruling.
THE COURT: I think, though, the plaintiff was substantially successful on its claim for fees. Given the difficulties presented in isolating what relates to a frivolous claim, what relates to sanctions under the inherent powers of the court under the finding of suborning perjury claim, given the difficulties of that I don't think that the plaintiff should be the one to profit from the difficulty in isolating those. It is because of her conduct that we went through all of this. I think if it is something that reasonably can be isolated, it ought to be. I think Mr. Huston indicated the preparation for the trial that was scheduled in January can certainly be backed out from the work that was done after August 24th. I would agree that those services should not be included. Where work on the attorneys fees as a sanction issue is intertwined with other work and it is difficult or the defendant is unable to separate issue by issue what relates to each, if it is fairly attributable to work on the attorneys fees and the sanctions and it ought to be included. Before we spend a lot of time on this, let's see what

the bill says and what is submitted and then we have got something to talk from.
MR. FLYNN: I think that is right. I think we are kind of speculating. I would like to see it as well. That brings in a new potential problem, which is that in light of this ruling, I don't know that I am going to be able to proceed tomorrow. I got the time on my calendar. What I might want to do is confer with another civil litigator to come in and perhaps introduce expert testimony as to the reasonableness of time to bring a motion. I don't know that I can get that accomplished, getting that bill at 5 o'clock, by tomorrow morning.
THE COURT: You had the entire bill. Tomorrow you are going to have less than what you had before to go on. I think the broad spotlight on all attorneys fees has been narrowed, maybe not to a laser beam, but it is a lot less than it was before. If the finding had been the other way, it was our expectation that we were going to cover this whole thing in the time that we had set aside this week on these issues. So I agree with you, Mr. Flynn, that the focus has shifted slightly, but that I think it is more precise now and it certainly is within what you had been contemplating in preparing for originally.
MR. FLYNN: I will see if I can get somebody on this short notice.
THE COURT: Okay.
MR. FLYNN: Thank you.
MR. HUSTON: I have a couple other logistical points.
THE COURT: Yes.
MR. HUSTON: I would like to ask Your Honor to rule on whether Mr. Engel's testimony is needed and whether the filing about Mr. Engel might be sealed. It seems to me you have already observed, in response to Mr. Flynn's argument, that everything that Clary Engel has to say was gone into on the original hearing. He is going to have nothing to say on the subject of fees after August 24th of last year. I would ask you to quash that subpoena or rule that he is not necessary and then to seal the filing that Mr. Flynn made.
MR. FLYNN: May I be heard?
THE COURT: Yes, Mr. Flynn.
MR. FLYNN: We need Clary Engel. There has been testimony where he was asked to wear a wire. The Court is going to be

awarding fees based on this. We have to know how much of the time was spent trying to convince him to wear a wire, why he wouldn't do it, and whether it was unnecessary or not to do that. I believe he said he didn't want to be a Linda Tripp. We have a right to cross-examine him on that and on how much time they spent and burned up on working with him. The other thing I want to go into is how much they spent working getting him ready and prepared to testify under oath that he had been convicted of a crime five times until he was presented with more evidence. Obviously he is a rough character. I feel for them. You got a guy right out of prison who is on probation, on parole, out of prison in 1994, and it is hard to work with a guy like that. I don't know that the plaintiff should be punished for the allotted work that it takes to work with a difficult witness. What I do want to say as well is the reason for this is, and this is not to reopen the prior record, but it's to go into that fact that he was let out of prison in August, 1993 and admitted to a halfway house who knows how long. It could have been two months or a year. Then he is on super. ision. When people are on parole supervision, as the Court knows, they get urine tested, they get checked up on on a random basis by a parole officer, and so they tend to stay out of trouble and not pick up new offenses while they are on supervision. He was on parole until 1988 or '89. That gives a good explanation as to why he was not involved in picking up any new felonies during that period of time. As well, three months before his exwife was murdered, strangled and stabbed. I think there was a custody dispute and she threatened to go to the police --

THE COURT: You are throwing out all of these facts.

MR. FLYNN: I think if they are going to throw in the time and effort it took to work with him, it is difficult working with people like that I know that, but in fairness she shouldn't be sanctioned for all of the work that it takes to put this guy in good shape to get him presentable and gussied up for court.

THE COURT: It sounds to me like you are attempting to collaterally attack the order that was made on January 21st. I am not going to permit a collateral attack on that order. You had full opportunity, you being the plaintiff, had full opportunity in the week we were together in January to

examine Mr. Engel on these subjects. We are here now on the matter of reasonableness of attorneys fees. I don't see that the testimony that you are going to offer would have any bearing on it. I think some of the information would probably be apparent from the time descriptions. You may also be able to get some of that testimony from the attorneys. There may be testimony necessarily from counsel on the matter. Mr. Huston is pointing to himself. He will be giving some testimony. You will have an opportunity to examine him as to time that may have been spent on some of these items that you are referring to. How much time was spent preparing Mr. Engel for his court testimony and what was done by way of review of his previous criminal record and et cetera, you would have an opportunity to examine counsel on that. In fact, I think that probably would be a better source than Mr. Engel on this because it was counsel who charged for the work and who prepared the bill. I think you would be able to get the evidence that you are seeking from Mr. Huston as a witness when you examine him. So that for that reason and also on the question of the collateral attack here, I am going to deny your request to have Mr. Engel present as a witness. I don't believe that his testimony would be needed in the circumstances.

MR. FLYNN: Thank you, Your Honor. I obviously respectfully object to that.

THE COURT: Your objection is noted for the record.

MR. FLYNN: Also for the record, as an offer of proof, what I would intend to go into with him as well, which has been submitted as recently as August of 1999, is the fact that his exwife, Theresa Lynn Engel, filed a restraining order saying that he physically abused her and her daughter and dislocated her knee. As recently as August of 1999, a call was made to the Police Department regarding his exwife about "the situation is getting ugly and he is moving out taking property." Again, this is going to his character and the difficulty it takes to work with somebody like that.

MR. HUSTON: Your Honor, will you seal the filing?

THE COURT: I will also place under seal the filing that was made this morning with respect to Mr. Engel. I will hand that to the clerk. It will be placed with the other sealed materials

on the same subject.
MR. HUSTON: Thank you, Your Honor. I will testify tomorrow morning. We will have Mr. Mulligan testify. That will be the extent of our case. I hope that Mr. Flynn can tell me what he plans to do?
MR. FLYNN: I would preliminarily say I would object to proceeding like this. I don't know when I am going to get this thing. If I get it at 5 o'clock tonight, I have got to look at it, study it, be ready by 9 o'clock tomorrow morning.
THE COURT: 9 o'clock we start.
MR. FLYNN: That is very little time. At least the issues now or becoming focused.
THE COURT: I would assume if you were objecting originally to the entire attorneys fees that was submitted, that you would have had a witness prepared on that issue and had one available and that fee I would think would be substantially higher than the one that we are talking about. So that you would have had an expert already available on that issue. It would be reasonable for me to expect that if you wanted to have testimony offered on reasonableness of the entire fee, it would now simply be a matter of you getting together with your expert and narrowing the focus.
MR. FLYNN: The other matter I want to place on the record is that we have a stipulation that he and Ms. Kopps will be available on an as needed basis.
MR. HUSTON: They will be.
THE COURT: Okay. Thank you.
MR. HUSTON: Thank you, Your Honor.

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REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on February 29, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 17th day of March, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

March 10, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

ALEX FLYNN, appeared on behalf of the Plaintiffs.
JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

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DECISION

THE COURT: Our Supreme Court in the Village of Shorewood v. Steinberg at 174 Wis. 2d 191 resorted to specifically Supreme Court Rule 20:1.5(a) and the factors set forth in that rule as an appropriate starting place in looking at the reasonableness of attorney fees that are claimed. I have particular affinity with the Shorewood case because this court was the trial court in that case. There are a number of factors set forth in that rule. The first of them is the time and labor record, the novelty and the difficulty of the questions involved, and the skill requisite to perform the legal services properly. Well, in the Court's view this was a very labor intensive operation. You had novel questions presented. If it was one thing that the Court and counsel on both sides all agreed on together, it was that there was no Wisconsin precedent on all fours with this situation. I suppose the Schaefer case maybe is the closest and one that I think was discovered relatively later on. I think that probably comes the closest. That is the one with the auto accident and the question of who was driving the truck when the accident occurred. That case was discussed largely in terms of a duty to cooperate, which is language in the insurance policy. It boiled down to a question of somebody not being truthful. The trial court there was sustained where it awarded, based on its inherent powers, attorneys fees to the insurer in that situation. This is a novel situation in this Court's experience certainly. Fortunately, it is something that is not often encountered. I believe the skill necessary to deal with a novel question such as this one would be definitely in the higher part of the range of skills necessary. This is not something that a novice lawyer could handle. It required the understanding of defamation law, the understanding of applicable rules of evidence, and particularly the types of use that could be made of criminal records, other acts. It required some familiarity with certain phases of criminal law in presenting this case. So that I think it was a situation of unusual difficulty. As I say, in my 17 years on the bench and 15 years of practice before that, I have never encountered a situation like this. That is 32 years since I graduated from law school. The second factor listed here is the likelihood in

appearing for a client is that the acceptance of the particular employment would preclude other employment by the lawyer. Well, it was stated policy here, as Mr. Huston indicated in his testimony, that representing media defendants in defamation cases necessarily precludes representation of plaintiffs. First of all, there is a potential conflict of interest problem. Second of all, your media clients would not be happy if they knew that you were actively prosecuting cases on behalf of plaintiffs and taking appeals in cases and trying to make law in appellate courts that would be necessary bad law from the point of view of the media defendant. So that the nature of the work is such that you can't work both sides of the fence in this area of the law. You have to be committed one way or the other and then employment on one side necessarily precludes employment on the other. The third factor here is the fee customarily charged in the locality for similar legal services. The testimony here indicated that the fees that were charged were the usual fees that are charged by the defense lawyers for work done for this client. It was no more and it was no less. It was the standard rate that is charged in their representation of this client. With regard to the fee itself, certainly the fees here are in the high end of the range. That I think is acknowledged. Foley & Lardner is a highly respected firm in this state. I think they are a respected firm nationally. They have offices in a number of other cities in this state and elsewhere in the country, elsewhere in the world. I don't know exactly how many lawyers they have in that firm, but I think it is over 400. Size alone isn't necessarily an indicator of the quality of the legal services, but I think it is fair to say that the representation of this firm locally and nationally is one that provides high caliber legal service to its clients. Additionally, Foley & Lardner has long provided legal service to the Journal Company. They have defended the Journal Company for years. This Court's experience, in reading the old cases in the reports, is wherever the Journal was involved in a defamation case it was Foley & Lardner who was representing them. So that this long standing relationship has also allowed the firm to develop an expertise in the area. That expertise I think is something that places them in a unique position with their experience and the marketplace that would fairly command a

fee in the higher end of the range. That is reflective of the fact that they have this experience and they have a proven track record in these cases. The next factor is the amount involved and the results obtained. Well, the amount involved here was never determined, but I think it is fair to say that the plaintiff was looking for a substantial amount. She at one point had told Mr. Engel that she was going to be expecting a substantial recovery and he would share in a part of it. She was going to be getting a lot of money in this case. So that the plaintiff looked at it as sort of a pot of gold at the end of the rainbow for her. It was worth a lot of money to her. I think it also was acknowledged by the defendants that they don't like these cases to get to juries. They don't like juries in defamation cases because juries look at the individual plaintiff and the corporate media defendant and sometimes, depending upon how all the evidence goes in, deending upon how the jury takes to plaintiff, if they like the plaintiff there may be a sympathetic factor at work that is hard to counter where you are looking at the big media corporation on one hand and the little individual plaintiff on the other. So that the danger to the defendants if this went to a jury, the exposure would be substantial. I dare say that this court has had an opportunity to rule on summary judgment on the two surviving claims. I agreed with Judge Foley's analysis here that those claims ought to survive. They ought to have been heard by a jury and a jury could well have come in with a substantial verdict here. Again it would depend upon how some of these exhibits, how some of the evidence would come in on damages too. The evidence was attempted to be offered here in Exhibits 13 and 14 on the damages the plaintiff would have suffered or did suffer or claimed to have suffered as a result of the actions of the defendants. So that damages are problematical. Suffice it to say, the plaintiff was looking for a lot of money and the defendants were apprehensive that if this case got to a jury, that there was substantial exposure. The result obtained from the defendants point of view couldn't have been a better result. They got the case dismissed without a trial. It doesn't get much better than that from the defendants point of view. That is a fact that would have to weigh heavily also in consideration of the fee charged. This was an excellent result from the

defendants point of view. They did not have to risk going in front of a jury and defending themselves to a jury on this case. The next factor is the time limitation imposed by the client or by the circumstances. Well, I think the Court was probably an agent that acted here to impose some time limitations. I think everybody was under the gun on time limitations. I did try to keep this case moving along, yet recognizing on the one hand medical emergencies that arose and a need to prepare so that the parties could be prepared to fully and fairly present their case. Originally this case was set to go to trial on December 20th. The plaintiff, Ms. Schultz, had a medical emergency on that day. The case was put over at her behest to January 10th. The lawyers were under a tight time frame here. There would have been, as I recall, subject to check here, but I believe that we had date in February for this case to proceed to trial if a motion had not been successful. So that the lawyers were already doing work in preparation for the trial in January while this hearing was all going on, so that there was a time crunch here. There were outside circumstances that placed some strictures on them and they were doing a lot of work not only to get ready for the hearing on the motion to dismiss but also to prepare for trial. In short, they were under a lot of pressure. The sixth factor is the nature and length of the professional relationship with the client. Well, this is something that I alluded to earlier. I think it is well known in the legal community in town here that Foley & Lardner has been the counsel for the Journal Company. Mr. Mulligan mentioned it in his testimony. It is a long relationship. It goes back many years. I think it was also tied in with another factor here that the Court discussed earlier. I don't think anymore needs to be said. The seventh factor is the experience, reputation and ability of the lawyer or lawyers performing the services. That also has been mentioned earlier in connection with one of the other factors. I don't think any more needs to be said. The last factor is whether the fee is fixed or contingent. This was a fee charged on the basis of fixed hourly rates. The plaintiff has raised some issues here which I would like to discuss. First of all, there was raised the question of the plaintiff's ability to pay. I know that is not among the factors in the Supreme Court Rule on reasonableness of fees, but

certainly it is a real life factor to be considered. Fees have to be charged consistent with what the traffic will bear, what the market rate is. I think there was testimony here during the hearing about how there is a lot of competition currently by law firms for business. Clients often, as Mr. Mulligan said, sophisicated corporate clients will often shop the market getting proposals from different firms for a piece of legal business. They will evaluate the proposals and select a firm and go with that firm. So that sometimes the long standing allegiance, I think some of those may be going by the board. Although the allegiance here between the Journal Company and Foley & Lardner on the defamation cases continues to be along standing one. I think suffice it to say this is all against the backdrop of a market where this sort of thing is taking place. So that I think any law firm, even with a long standing client, still wants to keep that client. If the client feels they are being overcharged, they certainly do have the option to go elsewhere with their work. That is also in the background and has to be recognized in the highly competitive environment that exists today. With regard to plaintiff's ability to pay, there is not much evidence in the record from which the Court can infer anything. We know that she owns a $500,000 in Mequon which is encumbered with a mortgage. There is evidence that she conveyed her interest in that home to her husband in January, I believe, of this year. It was within 10 days of the Court's decision on the motion to dismiss that the deed was signed. Whether that is mere coincidence or something else, may be an issue for another day. We know that she has signed a marital settlement agreement. That marital agreement is in the record, but none of the financial information is there. There really is not much known about her ability to pay currently such as what her assets, debts, and sources of income are. That has not been fleshed out. So that while she requests that that be taken into account, it is hard to give it much consideration when the evidence on the subject hasn't been fleshed out for the Court. Also it was argued that there was an unreasonable delay by the defendants in bringing this to the attention of the Court and that what should have been done in this matter is it should have been brought immediately to the Court's attention when Clary Engel's story

was relayed to the defendants. It would have been around August 24th of 1999 that they should have marched up here forthwith and advised the Court of what they learned. Mr. Mulligan commented on that. I tend to agree with his commentary. I think you have got to go slow on something like this. You don't lightly accuse somebody of suborning perjury. It is something that seldom comes up in our legal system fortunately. To level that allegation at a party opponent is something that should not be done lightly. I think it calls for some investigation. It raises a number of interesting legal questions. Is it a basis for a motion to dismiss in Wisconsin is not entirely clear. I think you have to piece together some authorities to get there. The Chevron case and also the Allis Chalmers v. Johnson case is another case, but it is not readily apparent. So that I can't fault the defendants for wanting to have their ducks in a row before they filed this motion and brought it to the attention of the Court. I think filing the motion, as Mr. Mulligan said, is the way to do it. You don't come here. I would have had to say you are going to have to have an evidentiary hearing on this. I don't think that plaintiffs would want me to do this and I would not do it. I couldn't take the defendants at their word that there had been an attempt to suborn perjury. It would be necessary to hold a hearing, develop the evidence, so that a reasoned decision could be reached from the facts that were presented. That is exactly what was done here. That necessarily is the more lengthy process, but I think it is also the process which is more likely to ensure that the plaintiff receives her dué process. So that again, you cannot fault the defendant for delaying in bringing this matter to the attention of the Court. Another point that was raised here was the fact that the the defendant had defamation insurance. That defamation insurance was going to pay. It was unstated but I think the implicit conclusion is the plaintiff shouldn't have to pay this because it is all covered by the insurance policy which Mr. Kritzer neglected to bring with him when he testified the other day. Well, Wisconsin does have the collateral source rule. The gist of that rule is that a wrongdoer should not profit from the fact that the party wronged happened to have insurance. It is a familiar concept in tort law in Wisconsin. Especially in the

field of negligence law. I am assuming there is coverage but we don't really know that for sure. Assuming for the sake of argument that there is coverage for the Journal for defamation that would cover this instance here, I don't think that that should provide a defense to the plaintiff from having to pay the attorneys fees for the defendant occasioned by her attempt to suborn perjury. Another issue raised by the plaintiff was the fact that this file was overworked. Those were counsel's words. Drawing on my own experience as a practitioner, I always found that when something got adjourned, a trial got adjourned or hearing got adjourned or anything was stretched out over a period of time, I always spent more time on it than you would have if you would have done it all at once and gotten it over with. If a trial is adjourned for six months you did have some familiarity, but you still had to spend almost as much time preparing it the second time as you did the first time. That was at least my experience. I think it also needs to be said here that there were adjournments granted. I believe almost all of the adjournments in this case were at the request of the plaintiff. They were for the plaintiff's benefit. They were all for cause shown. One case was a medical reason. The other case was a need to prepare or need to get this witness or to do that. That also tends to increase the amount of time that the other side spends on the case and I dare say it probably increased the amount of time that the plaintiffs had to spend on the case. Adjournments inevitably do that. You have to put something down because you were not going to trial or not going to hearing and then you are maybe working on a couple other things and then you got to pick it up again. We are not perfectly efficient machines that way. We do not function like machines. We work on these things. You've got to get back into something. I am working on a decision in the back in fact. I have been working on it about two and a half to three weeks. If I don't work on it for a few days, I spend an hour, hour and a half getting myself back to where I was working on it three days ago. There is that kind of slippage and I think that inevitably occurs when something is adjourned or delayed. I don't believe that this file was overworked. So, that from all of this I conclude that the fees requested here on Exhibit 12, together with the costs and disbursements shown

through March 10th, which is today, were reasonable and necessary expenses incurred by the defendant in the discovery, investigation, prosecution, and trial of the motion to dismiss and that that total amount, as shown on Exhibit 12, which is the sum of $155,797.31, is allowed as reasonable attorneys fees. This is something which the plaintiffs shall be jointly and severally liable for. I would ask then, Mr. Huston, on behalf of the defendants, that would you draw the appropriate order, submit it under the five day rule with a copy to counsel opposed. MR. HUSTON: Your Honor, I happen to have an order not with the amount in it although one that is here.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

) SS

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on March 10, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 12th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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WEST'S WISCONSIN STATUTES ANNOTATED
CRIMES
CHAPTER 951. CRIMES AGAINST ANIMALS

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Current through 2001 Act 43, published 2/15/02

951.13. Providing proper food and drink to confined animals

No person owning or responsible for confining or impounding any animal may fail to supply the animal with a sufficient supply of food and water as prescribed in this section.

(1) Food. The food shall be sufficient to maintain all animals in good health.

(2) Water. If potable water is not accessible to the animals at all times, it shall be provided daily and in sufficient quantity for the health of the animal.

WEST'S WISCONSIN STATUTES ANNOTATED
CRIMES
CHAPTER 951. CRIMES AGAINST ANIMALS

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951.03. **Dognapping** and catnapping

No person may take the dog or cat of another from one place to another without the owner's consent or cause such a dog or cat to be confined or carried out of this state or held for any purpose without the owner's consent. This section does not apply to law enforcement officers or humane officers engaged in the exercise of their official duties.

[Code of Federal Regulations]
1. [Title 47, Volume 4, Parts 70 to 79]
[Revised as of October 1, 1997]
From the U.S. Government Printing Office via GPO Access
[**CITE**: **47CFR73.1920**]

[Page 297-298]

TITLE 47--TELECOMMUNICATION

CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION (Continued)

PART 73--RADIO BROADCAST SERVICES--Table of Contents

Subpart H--Rules Applicable to All Broadcast Stations

Sec. 73.**1920** Personal attacks.

(a) When, during the presentation of views on a controversial issue
of public importance, an attack is made upon the honesty, character,
integrity or like personal qualities of an identified person or group,
the licensee shall, within a reasonable time and in no event later than
one week after the attack, transmit to the persons or group attacked:

(1) Notification of the date, time and identification of the broadcast;

(2) A script or tape (or an accurate summary if a script or tape is not available) of the attack; and

(3) An offer of a reasonable opportunity to respond over the licensee's facilities.

(b) The provisions of paragraph (a) of this section shall not apply to broadcast material which falls within one or more of the following categories:

(1) Personal attacks on foreign groups or foreign public

figures;

(2) Personal attacks occurring during uses by legally qualified candidates.

(3) Personal attacks made during broadcasts not included in paragraph (b)(2) of this section and made by legally qualified candidates, their authorized spokespersons, or those associated with them in the campaign, on other such candidates, their authorized spokespersons or persons associated with the candidates in the campaign; and

(4) Bona fide newscasts, bona fide news interviews, and on-the-spot coverage of bona fide news events, including commentary or analysis contained in the foregoing programs. [[Page 298]]

(c) The provisions of paragraph (a) of this section shall be applicable to editorials of the licensee, except in the case of noncommercial educational stations since they are precluded from editorializing (section 399(a), Communications Act). [43 FR 45856, Oct. 4, 1978, as amended at 44 FR 45956, Aug. 6, 1979]

WEST'S WISCONSIN STATUTES ANNOTATED
MISCELLANEOUS ACTIONS, PROCEEDINGS AND PROCEDURE
CHAPTER 895. MISCELLANEOUS GENERAL PROVISIONS

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895.05. Damages in actions for libel

(1) The proprietor, publisher, editor, writer or reporter upon any newspaper published in this state shall not be liable in any civil action for libel for the publication in such newspaper of a true and fair report of any judicial, legislative or other public official proceeding authorized by law or of any public statement, speech, argument or debate in the course of such proceeding. This section shall not be construed to exempt any such proprietor, publisher, editor, writer or reporter from liability for any libelous matter contained in any headline or headings to any such report, or to libelous remarks or comments added or interpolated in any such report or made and published concerning the same, which remarks or comments were not uttered by the person libeled or spoken concerning the person libeled in the course of such proceeding by some other person.

(2) Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a

reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as the libeled person's statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

WEST'S WISCONSIN STATUTES ANNOTATED
EVIDENCE
CHAPTER 901. EVIDENCE--GENERAL PROVISIONS

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901.04. Preliminary questions

(1) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the judge, subject to sub. (2) and ss. 971.31(11) and 972.11(2). In making the determination the judge is bound by the rules of evidence only with respect to privileges and as provided in s. 901.05.

(2) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(3) Hearing out of the presence of a jury. Hearings on any of the following shall be conducted out of the presence of the jury:

(a) Admissibility of confessions.

(b) In actions under s. 940.22, admissibility of evidence of the patient's or client's personal or medical history.

(c) In actions under s. 940.225, 948.02, 948.025 or 948.095, admissibility of the prior sexual conduct or reputation of a complaining witness.

(cm) Admissibility of evidence specified in s. 972.11(2)(d).

(d) Any preliminary matter if the interests of justice so

requires.

(4) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself or herself to cross-examination as to other issues in the case.

(5) Weight and credibility. This section does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

JUDICIAL COUNCIL COMMITTEE'S NOTE--1974

2000 Main Volume

Sub. (1). This subsection is consistent with Wisconsin decisions that the trial judge determines: a witness's qualification, Collier v. State, 30 Wis.2d 101, 140 N.W.2d 252 (1966); State v. Schweider, 5 Wis.2d 627, 94 N.W.2d 154 (1959); Jacobson v. Greyhound Corp., 29 Wis.2d 55, 138 N.W.2d 133 (1965); existence of a privilege, Stelloh v. Liban, 21 Wis.2d 119, 124 N.W.2d 101 (1963); Abraham v. State, 47 Wis.2d 44, 176 N.W.2d 349 (1970); State ex rel. Dudek v. Circuit Court for Milwaukee County, 34 Wis.2d 559, 592, 150 N.W.2d 387, 405 (1967) 35 A.L.R.3d 377; and the admissibility of a confession, State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965), certiorari denied 86 S.Ct. 1941, 384 U.S. 1017, 16 L.Ed.2d 1039. See J. Wigmore, Evidence § 2550 (3d ed. 1940) [hereinafter cited as Wigmore]. Exoneration of the trial judge from the rules of evidence in making his determination has not been articulated in Wisconsin decisions, but s. 262.17(1)(b) [801.10(4)] provides for proof of service by affidavit and ss. 269.32 [801.15, 802.01], 269.45 [801.15], 270.50 [repealed] and 270.635 [802.08] permit rulings on motions based upon affidavits. The second sentence deviates from the federal rule only in the interest of clarity; no change of substance is intended.

Sub. (2). This section is consistent with the Wisconsin manner of handling conditional relevancy. Huse v. Milwaukee County Expressway Comm'n, 16 Wis.2d 225, 114 N.W.2d 429 (1962).

Sub. (3). This subsection is consistent with Wisconsin practice, State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965), certiorari denied 86 S.Ct. 1941, 384 U.S. 1017, 16 L.Ed.2d 1039; State v. McGee, 52 Wis.2d 736, 190 N.W.2d 893 (1971); State v. Brown, 50 Wis.2d 565, 185 N.W.2d 323 (1971). Also see s. 971.31(3).

Sub. (4). Wisconsin limits cross-examination when the accused testifies upon a preliminary matter, State ex rel. Goodchild v. Burke, 27 Wis.2d 244, 133 N.W.2d 753 (1965), certiorari denied 86 S.Ct. 1941, 384 U.S. 1017, 16 L.Ed.2d 1039; however such a limitation does not preclude use of such testimony for impeachment purposes if the defendant's subsequent testimony is inconsistent, Ameen v. State, 51 Wis.2d 175, 186 N.W.2d 206 (1971).

Sub. (5). Wisconsin recognizes the jury's function in weighing and determining the credibility of testimony with respect to questions of preliminary admissibility already determined in favor of admissibility by the judge. Collier v. State, 30 Wis.2d 101, 140 N.W.2d 252 (1965).

WISCONSIN STATUTES ANNOTATED
ORGANIZATION OF STATE GOVERNMENT
CHAPTER 19. GENERAL DUTIES OF PUBLIC OFFICIALS
SUBCHAPTER II. PUBLIC RECORDS AND PROPERTY

Current through 2001 Act 43, published 2/15/02

19.35. Access to records; fees

(1) Right to inspection. (a) Except as otherwise provided by law, any requester has a right to inspect any record. Substantive common law principles construing the right to inspect, copy or receive copies of records shall remain in effect. The exemptions to the requirement of a governmental body to meet in open session under s. 19.85 are indicative of public policy, but may be used as grounds for denying public access to a record only if the authority or legal custodian under s. 19.33 makes a specific demonstration that there is a need to restrict public access at the time that the request to inspect or copy the record is made.

(am) In addition to any right under par. (a), any requester who is an individual or person authorized by the individual, has a right to inspect any record containing personally identifiable information pertaining to the individual that is maintained by an authority and to make or receive a copy of any such information. The right to inspect or copy a record under this paragraph does not apply to any of the following:

1. Any record containing personally identifiable information that is collected or maintained in connection with a complaint, investigation or other circumstances that may lead to an enforcement action, administrative proceeding, arbitration proceeding or court proceeding, or any such record that is collected or maintained in connection with such an action or proceeding.

2. Any record containing personally identifiable information that, if disclosed, would do any of the following:

a. Endanger an individual's life or safety.

b. Identify a confidential informant.

c. Endanger the security, including the security of the population or staff, of any state prison under s. 302.01, jail, as defined in s. 165.85(2)(bg), secured correctional facility, as defined in s. 938.02(15m), secured child caring institution, as defined in s. 938.02(15g), secured group home, as defined in s. 938.02(15p), mental health institute, as defined in s. 51.01(12), center for the developmentally disabled, as defined in s. 51.01(3), or facility, specified under s. 980.065, for the institutional care of sexually violent persons.

d. Compromise the rehabilitation of a person in the custody of the department of corrections or detained in a jail or facility identified in subd. 2. c.

3. Any record that is part of a records series, as defined in s. 19.62(7), that is not indexed, arranged or automated in a way that the record can be retrieved by the authority maintaining the records series by use of an individual's name, address or other identifier.

(b) Except as otherwise provided by law, any requester has a right to inspect a record and to make or receive a copy of a record which appears in written form. If a requester appears personally to request a copy of a record, the authority having custody of the record may, at its option, permit the requester to photocopy the record or provide the requester with a copy substantially as readable as the original.

(c) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is in the form of a comprehensible audio tape recording a copy of the tape recording substantially as audible as the original. The authority may instead provide a transcript of the recording to the requester if he or she requests.

(d) Except as otherwise provided by law, any requester has a

right to receive from an authority having custody of a record which is in the form of a video tape recording a copy of the tape recording substantially as good as the original.

(e) Except as otherwise provided by law, any requester has a right to receive from an authority having custody of a record which is not in a readily comprehensible form a copy of the information contained in the record assembled and reduced to written form on paper.

(em) If an authority receives a request to inspect or copy a record that is in handwritten form or a record that is in the form of a voice recording which the authority is required to withhold or from which the authority is required to delete information under s. 19.36(8)(b) because the handwriting or the recorded voice would identify an informant, the authority shall provide to the requester, upon his or her request, a transcript of the record or the information contained in the record if the record or information is otherwise subject to public inspection and copying under this subsection.

(f) Except as otherwise provided by law, any requester has a right to inspect any record not specified in pars. (b) to (e) the form of which does not permit copying. If a requester requests permission to photograph the record, the authority having custody of the record may permit the requester to photograph the record. If a requester requests that a photograph of the record be provided, the authority shall provide a good quality photograph of the record.

(g) Paragraphs (a) to (c), (e) and (f) do not apply to a record which has been or will be promptly published with copies offered for sale or distribution.

(h) A request under pars. (a) to (f) is deemed sufficient if it reasonably describes the requested record or the information requested. However, a request for a record without a reasonable limitation as to subject matter or length of time represented by the record does not constitute a sufficient request. A request may be made orally, but a request must be

in writing before an action to enforce the request is commenced under s. 19.37.

(i) Except as authorized under this paragraph, no request under pars. (a) and (b) to (f) may be refused because the person making the request is unwilling to be identified or to state the purpose of the request. Except as authorized under this paragraph, no request under pars. (a) to (f) may be refused because the request is received by mail, unless prepayment of a fee is required under sub. (3)(f). A requester may be required to show acceptable identification whenever the requested record is kept at a private residence or whenever security reasons or federal law or regulations so require.

(j) Notwithstanding pars. (a) to (f), a requester shall comply with any regulations or restrictions upon access to or use of information which are specifically prescribed by law.

(k) Notwithstanding pars. (a), (am), (b) and (f), a legal custodian may impose reasonable restrictions on the manner of access to an original record if the record is irreplaceable or easily damaged.

(L) Except as necessary to comply with pars. (c) to (e) or s. 19.36(6), this subsection does not require an authority to create a new record by extracting information from existing records and compiling the information in a new format.

(2) Facilities. The authority shall provide any person who is authorized to inspect or copy a record under sub. (1)(a), (am), (b) or (f) with facilities comparable to those used by its employees to inspect, copy and abstract the record during established office hours. An authority is not required by this subsection to purchase or lease photocopying, duplicating, photographic or other equipment or to provide a separate room for the inspection, copying or abstracting of records.

(3) Fees. (a) An authority may impose a fee upon the requester of a copy of a record which may not exceed the actual, necessary and direct cost of reproduction and

transcription of the record, unless a fee is otherwise specifically established or authorized to be established by law.

(b) Except as otherwise provided by law or as authorized to be prescribed by law an authority may impose a fee upon the requester of a copy of a record that does not exceed the actual, necessary and direct cost of photographing and photographic processing if the authority provides a photograph of a record, the form of which does not permit copying.

(c) Except as otherwise provided by law or as authorized to be prescribed by law, an authority may impose a fee upon a requester for locating a record, not exceeding the actual, necessary and direct cost of location, if the cost is $50 or more.

(d) An authority may impose a fee upon a requester for the actual, necessary and direct cost of mailing or shipping of any copy or photograph of a record which is mailed or shipped to the requester.

(e) An authority may provide copies of a record without charge or at a reduced charge where the authority determines that waiver or reduction of the fee is in the public interest.

(f) An authority may require prepayment by a requester of any fee or fees imposed under this subsection if the total amount exceeds $5. If the requester is a prisoner, as defined in s. 301.01 (2), or is a person confined in a federal correctional institution located in this state, and he or she has failed to pay any fee that was imposed by the authority for a request made previously by that requester, the authority may require prepayment both of the amount owed for the previous request and the amount owed for the current request.

(4) Time for compliance and procedures. (a) Each authority, upon request for any record, shall, as soon as practicable and without delay, either fill the request or notify the requester of the authority's determination to deny the request in whole or in part and the reasons therefor.

(b) If a request is made orally, the authority may deny the request orally unless a demand for a written statement of the reasons denying the request is made by the requester within 5 business days of the oral denial. If an authority denies a written request in whole or in part, the requester shall receive from the authority a written statement of the reasons for denying the written request. Every written denial of a request by an authority shall inform the requester that if the request for the record was made in writing, then the determination is subject to review by mandamus under s. 19.37(1) or upon application to the attorney general or a district attorney.

(c) If an authority receives a request under sub. (1)(a) or (am) from an individual or person authorized by the individual who identifies himself or herself and states that the purpose of the request is to inspect or copy a record containing personally identifiable information pertaining to the individual that is maintained by the authority, the authority shall deny or grant the request in accordance with the following procedure:

1. The authority shall first determine if the requester has a right to inspect or copy the record under sub. (1)(a).

2. If the authority determines that the requester has a right to inspect or copy the record under sub. (1)(a), the authority shall grant the request.

3. If the authority determines that the requester does not have a right to inspect or copy the record under sub. (1)(a), the authority shall then determine if the requester has a right to inspect or copy the record under sub. (1)(am) and grant or deny the request accordingly.

(5) Record destruction. No authority may destroy any record at any time after the receipt of a request for inspection or copying of the record under sub. (1) until after the request is granted or until at least 60 days after the date that the request is denied or, if the requester is a committed or incarcerated person, until at least 90 days after the date that the request is denied. If an authority receives written notice that an action

relating to a record has been commenced under s. 19.37, the record may not be destroyed until after the order of the court in relation to such record is issued and the deadline for appealing that order has passed, or, if appealed, until after the order of the court hearing the appeal is issued. If the court orders the production of any record and the order is not appealed, the record may not be destroyed until after the request for inspection or copying is granted.

(6) Elected official responsibilities. No elected official is responsible for the record of any other elected official unless he or she has possession of the record of that other official.

WEST'S WISCONSIN STATUTES ANNOTATED
CONSTITUTION OF THE STATE OF WISCONSIN
ARTICLE I. DECLARATION OF RIGHTS

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Current with amendments received through 3/1/02

§ 5. Trial by jury; verdict in civil cases

Section 5. The right of trial by jury shall remain inviolate, and shall extend to all cases at law without regard to the amount in controversy; but a jury trial may be waived by the parties in all cases in the manner prescribed by law. Provided, however, that the legislature may, from time to time, by statute provide that a valid verdict, in civil cases, may be based on the votes of a specified number of the jury, not less than five-sixths thereof.

WEST'S WISCONSIN STATUTES ANNOTATED
CIVIL PROCEDURE
CHAPTER 805. CIVIL PROCEDURE--TRIALS

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Current through 2001 Act 43, published 2/15/02

805.01. Jury trial of right

(1) Right preserved. The right of trial by jury as declared in article I, section 5, of the constitution or as given by a statute and the right of trial by the court shall be preserved to the parties inviolate.

(2) Demand. Any party entitled to a trial by jury or by the court may demand a trial in the mode to which entitled at or before the scheduling conference or pretrial conference, whichever is held first. The demand may be made either in writing or orally on the record.

(3) Waiver. The failure of a party to demand in accordance with sub. (2) a trial in the mode to which entitled constitutes a waiver of trial in such mode. The right to trial by jury is also waived if the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

WEST'S WISCONSIN STATUTES ANNOTATED
CRIMES
CHAPTER 946. CRIMES AGAINST GOVERNMENT AND ITS ADMINISTRATION
PERJURY AND FALSE SWEARING

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Current through 2001 Act 43, published 2/15/02

946.31. Perjury

(1) Whoever under oath or affirmation orally makes a false material statement which the person does not believe to be true, in any matter, cause, action or proceeding, before any of the following, whether legally constituted or exercising powers as if legally constituted, is guilty of a Class D felony:

(a) A court;

(b) A magistrate;

(c) A judge, referee or court commissioner;

(d) An administrative agency or arbitrator authorized by statute to determine issues of fact;

(e) A notary public while taking testimony for use in an action or proceeding pending in court;

(f) An officer authorized to conduct inquests of the dead;

(g) A grand jury;

(h) A legislative body or committee.

(2) It is not a defense to a prosecution under this section that the perjured testimony was corrected or retracted.

WEST'S WISCONSIN STATUTES ANNOTATED
CRIMES
CHAPTER 939. CRIMES--GENERAL PROVISIONS
INCHOATE CRIMES

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939.30. Solicitation

(1) Except as provided in sub. (2) and ss. 948.35 and 961.455, whoever, with intent that a felony be committed, advises another to commit that crime under circumstances that indicate unequivocally that he or she has the intent is guilty of a Class D felony.

(2) For a solicitation to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class C felony. For a solicitation to commit a Class E felony, the actor is guilty of a Class E felony.

WEST'S WISCONSIN STATUTES ANNOTATED
CRIMES
CHAPTER 939. CRIMES--GENERAL PROVISIONS
INCHOATE CRIMES

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939.31. Conspiracy

Except as provided in ss. 940.43(4) , 940.45(4) and 961.41(1x), whoever, with intent that a crime be committed, agrees or combines with another for the purpose of committing that crime may, if one or more of the parties to the conspiracy does an act to effect its object, be fined or imprisoned or both not to exceed the maximum provided for the completed crime; except that for a conspiracy to commit a crime for which the penalty is life imprisonment, the actor is guilty of a Class B felony.

WEST'S WISCONSIN STATUTES ANNOTATED
CRIMES
CHAPTER 939. CRIMES--GENERAL PROVISIONS
INCHOATE CRIMES

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939.32. Attempt

(1) Whoever attempts to commit a felony or a crime specified in s. 940.19 , 940.195 or 943.20 may be fined or imprisoned or both not to exceed one-half the maximum penalty for the completed crime; except:

(a) Whoever attempts to commit a crime for which the penalty is life imprisonment is guilty of a Class B felony.

(b) Whoever attempts to commit a battery under s. 940.20(2) or (2m) is guilty of a Class A misdemeanor.

(c) Whoever attempts to commit a crime under ss. 940.42 to 940.45 is subject to the penalty for the completed act, as provided in s. 940.46.

(cm) Whoever attempts to commit a crime under s. 941.21 is subject to the penalty provided in that section for the completed act.

(d) Whoever attempts to commit a crime under s. 948.07 is subject to the penalty provided in that section for the completed act.

(e) Whoever attempts to commit a crime under s. 948.605(3)(a) is subject to the penalty provided in that paragraph for the completed act.

(2) Whoever attempts to commit a misdemeanor under s. 943.70 is subject to:

(a) A Class D forfeiture if it is the person's first violation under s. 943.70.

(b) A Class C forfeiture if it is the person's 2nd violation under s. 943.70.

(c) A Class B forfeiture if it is the person's 3rd violation under s. 943.70.

(d) A Class A forfeiture if it is the person's 4th or subsequent violation under s. 943.70.

(3) An attempt to commit a crime requires that the actor have an intent to perform acts and attain a result which, if accomplished, would constitute such crime and that the actor does acts toward the commission of the crime which demonstrate unequivocally, under all the circumstances, that the actor formed that intent and would commit the crime except for the intervention of another person or some other extraneous factor.

WEST'S WISCONSIN STATUTES ANNOTATED
CIVIL PROCEDURE
CHAPTER 814. COURT COSTS AND FEES
SUBCHAPTER I. COSTS IN CIVIL ACTIONS AND SPECIAL PROCEEDINGS

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Current through 2001 Act 43, published 2/15/02

814.025. Costs upon frivolous claims and counterclaims

(1) If an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense or cross complaint commenced, used or continued by a defendant is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs determined under s. 814.04 and reasonable attorney fees.

(2) The costs and fees awarded under sub. (1) may be assessed fully against either the party bringing the action, special proceeding, cross complaint, defense or counterclaim or the attorney representing the party or may be assessed so that the party and the attorney each pay a portion of the costs and fees.

(3) In order to find an action, special proceeding, counterclaim, defense or cross complaint to be frivolous under sub. (1), the court must find one or more of the following:

(a) The action, special proceeding, counterclaim, defense or cross complaint was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense or cross complaint was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

(4) To the extent s. 802.05 is applicable and differs from this section, s. 802.05 applies.

WEST'S WISCONSIN STATUTES ANNOTATED
CIVIL PROCEDURE
CHAPTER 802. CIVIL PROCEDURE--PLEADINGS, MOTIONS AND PRETRIAL PRACTICE

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Current through 2001 Act 43, published 2/15/02

802.05. Signing of pleadings, motions and other papers; sanctions

(1)(a) Every pleading, motion or other paper of a party represented by an attorney shall contain the name, state bar number, if any, telephone number, and address of the attorney and the name of the attorney's law firm, if any, and shall be subscribed with the handwritten signature of at least one attorney of record in the individual's name. A party who is not represented by an attorney shall subscribe the pleading, motion or other paper with the party's handwritten signature and state his or her address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The signature of an attorney or party constitutes a certificate that the attorney or party has read the pleading, motion or other paper; that to the best of the attorney's or party's knowledge, information and belief, formed after reasonable inquiry, the pleading, motion or other paper is well-grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; and that the pleading, motion or other paper is not used for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If the court determines that an attorney or party failed to read or make the determinations required under this subsection before signing any petition, motion or other paper, the court may, upon motion, or upon its own initiative, impose an appropriate sanction on the person who signed the

pleading, motion or other paper, or on a represented party, or on both. The sanction may include an order to pay the other party the amount of reasonable expenses incurred by that party because of the filing of the pleading, motion or other paper, including reasonable attorney fees.

(b) If the attorney who signed a pleading, motion or other paper without reading the paper or making the determinations required by this subsection is representing a party under a contract made between a 3rd person and the party that requires that representation, and the 3rd person has actual knowledge that the pleading, motion or other paper is not well-grounded in fact or warranted by existing law or a good faith argument for the extension, modification or reversal of existing law or is used to harass, delay or increase the cost of litigation, the court may impose a similar appropriate sanction on the 3rd person.

(c) The requirement of a handwritten signature subscribing pleadings, motions or other papers filed in court may be satisfied by a duplicate, as defined in s. 910.01(4), if a handwritten signature appears on the original document and the signing party or his or her attorney retains the original document.

(2) It is not a violation of sub. (1) if a pleading includes as a party a person who is later dismissed from that action, and the party responsible for including that person acted reasonably in doing so and moves for or agrees to a dismissal of that person within a reasonable time after the party knew or should have known that the person was not a proper party to the action.

(3)(a) A court shall review the initial pleading as soon as practicable after the action or special proceeding is filed with the court if the action or special proceeding is commenced by a prisoner, as defined in s. 801.02 (7) (a) 2.

(b) The court may dismiss the action or special proceeding under par. (a) without requiring the defendant to answer the pleading if the court determines that the action or special

proceeding meets any of the following conditions:

1. Is frivolous, as determined under s. **814.025** (3).

2. Is used for any improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.

3. Seeks monetary damages from a defendant who is immune from such relief.

4. Fails to state a claim upon which relief may be granted.

(c) If a court dismisses an action or special proceeding under par. (b), the court shall notify the department of justice or the attorney representing the political subdivision, as appropriate, of the dismissal by a procedure developed by the director of state courts in cooperation with the department of justice.

(d) The dismissal of an action or special proceeding under par. (b) does not relieve the prisoner from paying the full filing fee related to that action or special proceeding.

WEST'S WISCONSIN STATUTES ANNOTATED
CIVIL PROCEDURE
CHAPTER 808. APPEALS AND WRITS OF ERROR

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Current through 2001 Act 43, published 2/15/02

808.03. Appeals to the court of appeals

(1) Appeals as of right. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment, order or disposition that disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding, and that is one of the following:

(a) Entered in accordance with s. 806.06(1)(b) or 807.11(2).

(b) Recorded in docket entries in ch. 799 cases.

(c) Recorded in docket entries in traffic regulation cases prosecuted in circuit court if a person convicted of a violation may be ordered to pay a forfeiture.

(d) Recorded in docket entries in municipal ordinance violation cases prosecuted in circuit court.

(2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

<<For credits, see Historical Note field.>>

COMMENTS--1995 ACT 139, § 2

2002 Electronic Update

This bill codifies that an appeal as of right of a final judgment or order in a traffic regulation case applies only in cases in which the penalty is a forfeiture.

JUDICIAL COUNCIL NOTES--1986

1994 Main Volume

Subsection (1) is amended to clarify that docket entries in small claims and other ch. 799 cases may be final orders from which an appeal may be taken as of right. See 1979 Judicial Council Note to sub. (1).

JUDICIAL COUNCIL NOTES--L.1979, C. 187

1994 Main Volume

This subsection [subsec. (1)] is amended to modify the statutory definition of the final judgment or final order that may be appealed as a matter of right to the court of appeals. Most types of cases decided in circuit court have a final judgment or order entered with the office of clerk of court. Because of the volume of traffic regulation and municipal ordinance violation cases prosecuted in circuit court, the prevailing custom in Wisconsin counties is to only record the dispositions of those cases in docket entries. Requiring counties to meet the present statutory requirement in subsection (1) of s. **808.03** for the entry of a final judgment or order in all cases for purposes of having an appealable matter is unnecessarily burdensome and costly.

The term "traffic regulation cases" refers to only those traffic violation cases in which the penalty is a civil forfeiture.

LEGISLATIVE COUNCIL NOTES--1977

1994 Main Volume

This section represents a major substantive change. It replaces former ss. 817.09 and 817.33.

Subsection (1) is based on former s. 817.09. It provides that final orders and final judgments are appealable as a matter of right to the court of appeals from a circuit court or county court. It provides that final decisions and orders of state administrative agencies are appealable as a matter of right as provided under the administrative procedure act, ch. 227, Wis.Stats. It also defines a final judgment or order. The reference to ss. 806.06(1)(b) and 807.11(2) is intended to resolve the problem that arises when an appeal is taken from an order issued in chambers or not reduced to writing. This subsection makes clear that only a judgment which has been entered in accordance with the provisions specified is appealable as a matter of right.

This subsection further makes clear that a judgment that is final as to some but not all of the parties, such as described in the first sentence of s. 806.01(2), is a final judgment. The significance of this provision is that a judgment dismissing one defendant must be appealed within the time provided in s. 808.04. There may be inconvenience to some party whether an appeal must be taken immediately after the dismissal or at the termination of the entire case. It is the conclusion of the Judicial Council that the more reasonable alternative is to require appeal of the dismissal at the earlier time.

Subsection (2) replaces former s. 817.33. That section contained a list of nonfinal orders which could be appealed to the Supreme Court as a matter of right. The recommendation of the National Center for State Courts is that "interlocutory trial court determinations should be reviewable only at the

discretion of the . . ." appellate court. The purpose of the recommendation is to avoid unnecessary interruptions and delay in trial court proceedings caused by multiple appeals and to reduce the burden on the court of appeals of dealing with unnecessary appeals. Subsection (2) is intended to provide standards for determining when permission to appeal an intermediate judgment or order should be granted. It is based upon s. 3.12 of the tentative draft of Standards Relating to Appellate Courts of the American Bar Association Commission on Standards of Judicial Administration (1976).

The procedure for appeal from a judgment or order not appealable as a matter of right is provided in s. 809.50.

WEST'S WISCONSIN STATUTES ANNOTATED
COURTS
CHAPTER 757. GENERAL PROVISIONS CONCERNING
COURTS OF RECORD, JUDGES,
ATTORNEYS AND CLERKS

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Current through 2001 Act 43, published 2/15/02

757.19. Disqualification of judge

(1) In this section, "judge" includes the supreme court justices, court of appeals judges, circuit court judges and municipal judges.

(2) Any judge shall disqualify himself or herself from any civil or criminal action or proceeding when one of the following situations occurs:

(a) When a judge is related to any party or counsel thereto or their spouses within the 3rd degree of kinship.

(b) When a judge is a party or a material witness, except that a judge need not disqualify himself or herself if the judge determines that any pleading purporting to make him or her a party is false, sham or frivolous.

(c) When a judge previously acted as counsel to any party in the same action or proceeding.

(d) When a judge prepared as counsel any legal instrument or paper whose validity or construction is at issue.

(e) When a judge of an appellate court previously handled the action or proceeding while judge of an inferior court.

(f) When a judge has a significant financial or personal interest

in the outcome of the matter. Such interest does not occur solely by the judge being a member of a political or taxing body that is a party.

(g) When a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.

(3) Any disqualification that may occur under sub. (2) may be waived by agreement of all parties and the judge after full and complete disclosure on the record of the factors creating such disqualification.

(4) Any disqualification under sub. (2) in a civil or criminal action or proceeding must occur, unless waived under sub. (3), when the factors creating such disqualification first become known to the judge.

(5) When a judge is disqualified, the judge shall file in writing the reasons and the assignment of another judge shall be requested under s. 751.03.

(6) In addition to other remedies, an alleged violation under this section or abuse of the disqualification procedure shall be referred to the judicial commission.

WISCONSIN SUPREME COURT RULES
SUPREME COURT RULES
SCR CHAPTER 20 RULES OF PROFESSIONAL CONDUCT FOR ATTORNEYS
CLIENT-LAWYER RELATIONSHIP

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Current with court orders received through 9/1/01

SCR 20:1.5. Fees

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (d) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination.

(d) A lawyer shall not enter into an arrangement for, charge or collect a contingent fee:

(1) in any action affecting the family, including but not limited to divorce, legal separation, annulment, determination of paternity, setting of support and maintenance, setting of custody and physical placement, property division, partition of marital property, termination of parental rights and adoption, provided that nothing herein shall prohibit a contingent fee for the collection of past due amounts of support or maintenance.

(2) for representing a defendant in a criminal case or any proceeding that could result in deprivation of liberty.

(e) A division of fee between lawyers who are not in the same firm may be made only if:

(1) the division is in proportion to the services performed by each lawyer or, by written agreement with the client, each lawyer assumes joint responsibility for the representation;

(2) the client is advised of and does not object to the participation of all the lawyers involved and is informed if the fee will increase as a result of their involvement; and

(3) the total fee is reasonable.

18 USCA S 402
18 U.S.C.A. § 402

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 21--CONTEMPTS

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Current through P.L. 107-19, approved 7-10-01

§ 402. Contempts constituting crimes

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts

committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law.

For purposes of this section, the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

Pet 139

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18 USCA S 3691
18 U.S.C.A. § 3691

UNITED STATES CODE ANNOTATED
TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART II--CRIMINAL PROCEDURE
CHAPTER 233--CONTEMPTS

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Current through P.L. 107-19, approved 7-10-01

§ 3691. Jury trial of criminal contempts

Whenever a contempt charged shall consist in willful disobedience of any lawful writ, process, order, rule, decree, or command of any district court of the United States by doing or omitting any act or thing in violation thereof, and the act or thing done or omitted also constitutes a criminal offense under any Act of Congress, or under the laws of any state in which it was done or omitted, the accused, upon demand therefor, shall be entitled to trial by a jury, which shall conform as near as may be to the practice in other criminal cases.

This section shall not apply to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States.

Pet 140

STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-0915

CYNTHIA A. SCHULTZ,
Plaintiff-Appellant-Petitioner

THE ANIMAL LOBBY, INC.,

Plaintiff-Co-Appellant

v.

CHARLES J. SYKES, JOURNAL BROADCAST GROUP, Inc. and **JOURNAL SENTINEL, INC.,**

Defendants-Respondents

PETITION FOR REVIEW OF APPELLANT SCHULTZ

CYNTHIA A. SCHULTZ'S PETITION FOR REVIEW
OF THE OCTOBER 4, 2001 DECISION OF
THE WISCONSIN COURT OF APPEALS, DISTRICT I
APPEAL NO. 00-0915
THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. FRANCIS T. WASIELEWSKI, PRESIDING
CIRCUIT COURT CASE NO. 98-CV-000724

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ISSUES FOR REVIEW

I. Should the Court of Appeals use a *de novo* standard of review when there is a constitutional challenge to a judge's use of his inherent powers to sanction?

Court of Appeals' Answered: No

II. Do the 6th and 14th Amendments to the United States Constitution permit a trial court in a civil case to conduct a perjury trial of the plaintiff without affording the plaintiff the constitutional protections guaranteed to a person accused of a crime?

Court of Appeals' Answer: Yes

III. Do the 5th, 8th, and 14th Amendments to the United States Constitution permit a civil trial court, under its inherent powers, to punish a plaintiff for attempting to suborn perjury by taking the plaintiff's valid cause of action, imposing a monetary sanction of $168,944.97, and ordering her to pay all appeal fee and costs, without according the plaintiff the constitutional procedural protections appropriate to a criminal case, when the court explicitly found that there was no prejudice to the opposing litigants and that no part of the case was frivolous?

Court of Appeals' Answer: Yes

IV. Was the plaintiff a limited purpose public figure and could she prove actual malice on some of the 78 claims that were dismissed by partial summary judgment?

Court of Appeals' Answer: The court did not address these issues.

PETITION FOR REVIEW

Cynthia A. Schultz (plaintiff-appellant-petitioner) hereby petitions the Wisconsin Supreme Court, pursuant to Rule 809.62, Stats., to review the decision of the Court of Appeals in Schultz v. Sykes, Case No. 97-3675, 2001 WI Ap 1,[3] filed October 4, 2001.

CRITERIA FOR REVIEW

There are three constitutional issues in this Petition. Therefore, the issues meet the first criterion for supreme court review in **Rule 809.62(1)(a), Stats.**, namely, each issue presents a "real and significant question of federal constitutional law." Moreover, pursuant to the requirement of **Rule 809.62(1)(d), Stats.**, the "court of appeals' decision in this case is in conflict with controlling opinions of the United States Supreme Court.

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[3]Note at P-App 101 that page 1 of the decision indicates that it is a decision of District I. However, the three judges who decided the case and wrote the opinion are in District IV. All the judges in District I recused themselves from this case and transferred it to District IV, but only after the District I judges had decided two petitions for a writ of mandamus and a motion against Ms. Schultz.

STATEMENT OF THE CASE AND APPEAL ISSUES

The plaintiff, Ms. Schultz, brought a defamation case against the defendants [hereafter "the Journal"] in 1998 [R.2]. It contained 80 claims of libel and slander [R.2], which occurred in multiple radio broadcasts by Charles Sykes [R.2 Ex.A] and in multiple articles in the Milwaukee Journal Sentinel [R.26:3-46].

The Journal filed motions to declare Ms. Schultz a public figure [R.6] and for summary judgment [R.7]. The trial court found that Ms. Schultz is a limited purpose public figure [R.22;190:1-9]and granted the Journal's summary judgment motion on 78 defamations that were made while the Journal and Sykes were reporting on a criminal dognapping case in which Ms.Schultz was involved.[R.191:1-25][4] None of the defamations had to do the reporting that Ms. Schultz was charged with being a party to a dognapping. Concluding that Ms. Schultz could prove actual malice on two claims, the trial court allowed those 2 claims to go forward. [R.32; 36; 191:1-25]. The 2 remaining defamation claims falsely accused Ms. Schultz, an animal rights advocate, of having "a dog killed and carved up to get publicity and prove a political point."

After discovery, the Journal brought both a second summary judgment motion, regarding the two claims still remaining for trial, and a motion to dismiss, which alleged that Ms. Schultz had committed perjury or subornation of perjury in the dismissed criminal dognapping case and in the instant case. The court denied the second summary judgment motion regarding the two remaining claims and set a date for trial.[R.124;A-Appendix 155]. However, in response to the Journal's motion to dismiss, the court held a four-day bench trial to determine if Ms. Schultz was guilty of suborning perjury. The court cited as authority for the perjury trial §

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[4] Ms. Schultz was charged in 1996 with being a party to the crime of dognapping. The case was dismissed for insufficient evidence before she filed the instant civil lawsuit for defamation.

901.04(3)(d), Stats., permitting courts to hold hearings on preliminary matters.[R.203:67].

The main witness against Ms. Schultz, during this civil perjury trial, was Clary Engel. Engel was listed on an early list of potential witnesses for the defamation case. He was, however, never proffered to the court as a witness. During the criminal bench trial, Engel testified that Ms. Schultz attempted to suborn perjury from him. Engel, however, also admitted that, before the Journal made their motion to dismiss, he had attempted to get money from the Journal and Sykes in exchange for his subornation of perjury story. Even with this fact and Engel's extensive criminal background, discussed by the court of appeals at ¶28 and ¶29, the trial court, deemed Engel a credible witness, and concluded that Ms. Schultz was guilty of attempting to suborn perjury from Engel.

As punishment for the attempted subornation of perjury [R.203:92], the court, under its inherent power, dismissed Ms. Schultz's two remaining claims that were set for trial, ordered her to pay the Journal and Sykes their attorneys' fees and costs from August 24, 2000 for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken." [R.208:63] The total judgment entered was $168,944.97 even though the court explicitly ruled that Ms. Schultz's case was not frivolous, [R.208:48-53], as the court of appeals acknowledged [¶7].[5]

In her appeal and in this petition, Ms. Schultz contends that the "inherent power" of a court can never trump the Constitution. First, Ms. Schultz maintains that the sanctions were punishment for a crime and were criminal in nature. Thus, as in criminal contempt, where a judge relies on his inherent powers, she should have been accorded the procedural protections the Constitution gives to anyone who is accused of a crime. This means that the perjury allegation

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[5] The court of appeals' opinion is in the Appendix to this brief. Citation will be to ¶ number rather than to brief page number or Appendix page number.

should not have been tried in an "evidentiary hearing" but in a trial with a notice of the magnitude of the punishment, a jury, an independent prosecutor and with the burden of proof being beyond all reasonable doubt. Second, Ms. Schultz contends that all punishment, that flowed from the constitutionally defective trial for perjury, must be overturned because the civil bench trial violated her procedural due process rights. Moreover, the sanctions are punitive, serious, and not calibrated to damages. Such punishment cannot be imposed where there has not been procedural protections appropriate to a criminal case. Third, Ms. Schultz contends that the court's award of punitive sanctions for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken." [R.208:63] impaired her substantive right of appeal and, therefore, violated her due process rights.

The court of appeals reviewed the trial court's findings and sanctions under the erroneous exercise of discretion standard and upheld them.[¶8] Then, the court of appeals addressed the constitutional issues of whether the trial court violated Ms. Schultz's constitutional rights by conducting the perjury trial and issuing the sanctions. The court of appeals did not shift to a *de novo* standard of review for these constitutional questions. [¶25]. Instead, it allowed its prior discretionary standard of review to control, and it found the trial court's actions constitutional. Thus, in addition to the substantive constitutional challenges in this petition, the petition also challenges the court of appeals' failure to use a *de novo* standard of review for the constitutional issues. This conflicts with previously established U. S. Supreme Court precedent, which is moving away from the what has been interpreted in Chambers v. Nasco, 501 U.S. 32 (1991), as almost unlimited authority for courts to impose sanctions. In United Mine Workers v. Bagwell, 512 U.S. 821 (1994), BMW of North America v. Gore, 517 U.S. 559 (1996), United States v. Bajakajian, 524 U.S. 321 (1998), and Cooper Industries v. Leatherman, ___ U.S. ___, 121 S.Ct. 1678 (2001), the Supreme Court has recognized that certain punitive sanctions are excessive, violate due process rights, and require procedural protections appropriate to a criminal case.

This petition is not for the purpose of challenging the inherent authority of courts when that authority is properly exercised. The petition does not claim that a trial court never has inherent authority to hold evidentiary hearings or to award attorney's fees. There is ample case law, in the state of Wisconsin and elsewhere, saying that courts do have such authority for contempt committed in their presence, for circumstances established by statute, or to punish the violation of a court order. However, there is a limit to a court's inherent authority. That limit is established by the Constitution. This petition maintains that the constitutional limit was crossed and that the trial court exceeded its inherent powers in this case.

This is also not a petition asking the supreme court to hold that there was insufficient evidence to find Ms. Schultz guilty of an attempt to suborn perjury. The position of Ms. Schultz is that she never committed perjury or attempted to suborn perjury [R. 202:72]. Yet, for purposes of this petition, the supreme court can believe that the trial court's and court of appeals' findings are correct. However, just as it does in the case of the most despicable criminal defendants, the supreme court should examine Ms. Schultz's constitutional claims in this petition to determine if she received the protections and entitlements that the Constitution gives even to those whom the courts, the newspapers, or the public do not like.

Our research has uncovered no other case in the state of Wisconsin or in the United States where a civil court held a civil trial for perjury and then dismissed claims, not defeated by the misconduct, and imposed serious monetary sanctions that were not calibrated to damages. The trial court acknowledged that this was a case of first impression with no cases on point [R. 203:94]. Defendants and their expert likewise acknowledged that this case was novel and unique and that no Wisconsin court considered such a case. [R. 198;15; 210:12; 210:91].

ARGUMENT

I. THE COURT OF APPEALS USED THE WRONG STANDARD OF REVIEW

The issues to be reviewed in this case are issues of law. Therefore, the supreme court should apply the *de novo* standard of review. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 250, 253 (1977). The court of appeals used the wrong standard of review. Because it treated this case as a sanctions issue, rather than as a 14th Amendment case, it applied the discretionary standard of review [¶ 8]. However, the court should not have reached the discretionary questions until it resolved the more basic question of whether Ms. Schultz's procedural due process rights were violated by the process the trial court used to find guilt and impose punishment. That required *de novo* review. Ms. Schultz contends that *de novo* review would have changed the outcome of the court of appeals' decision because its review of Ms. Schultz's constitutional challenges [¶ 25-¶34] was so expansively deferential to the trial court that it effectively ignored controlling law from the Supreme Court.

In Cooper Industries, 121 S.Ct. at 1682-85, concerning whether punitive jury-imposed damages were "excessive" under the Eighth Amendment, the Supreme Court held that the federal courts should apply a *de novo* standard of review to a court's determination of the constitutionality of punitive damage awards. *See also* Bajakajian, 524 U.S. at 336-37. While the sanctions in the instant case are not jury-imposed punitive damages, they are punitive, excessive, and were imposed without the protections of a jury. Thus, Cooper Industries, combined with other cases in this petition, stand for the principle that punitive sanctions, like punitive damages, also require the scrutiny of *de novo* review. The supreme court should take this case if for no other reason than to hold that *de novo* review is required, when a 14th Amendment challenge is raised to sanctions imposed under inherent powers.

II. MS. SCHULTZ WAS DENIED HER 6TH AND 14TH AMENDMENT CONSTITUTIONAL RIGHTS WHEN THE CIVIL TRIAL COURT, INVOKING ITS INHERENT AUTHORITY, CONDUCTED A CIVIL HEARING TO DETERMINE WHETHER SHE WAS GUILTY OF THE CRIME OF PERJURY, WITHOUT ACCORDING HER ANY OF THE CONSTITUTIONAL PROTECTIONS REQUIRED FOR A PERSON ACCUSED OF A CRIME.

The court of appeals says the trial court did not violate Ms. Schultz's constitutional rights because it did not find her guilty of perjury but of "litigation misconduct" and then sanctioned her for the "litigation misconduct." [¶ 33]. However, this rewrites the trial court's findings. The trial court never used the phrase "litigation misconduct" in its findings. The trial court said Ms. Schultz was guilty of "attempted subornation of perjury." Moreover, the court of appeals overlooks the fact that Ms. Schultz did not commit "litigation misconduct" unless she was guilty of "attempted subornation of perjury." Additionally, the court of appeals acknowledged in other parts of its opinion [Heading #1, ¶12, ¶14, ¶48] that the trial court's finding was explicitly about perjury rather than being vaguely about something called "litigation misconduct."

Because perjury, subornation of perjury, and attempts at perjury are crimes, the civil trial court could not hold a bench trial on perjury, under the guise of either its inherent authority or a § 901.04, Stats., evidentiary hearing, to determine whether Ms. Schultz was guilty of a crime. As in criminal contempt, the "inherent power" of a court to punish "litigation misconduct" does not permit a civil trial court to override constitutional protections for a person accused of a crime.

The civil trial court could have held a § 901.04, Stats., evidentiary hearing to determine if Ms. Schultz or the Journal would have been allowed to call Clary Engel as a witness; or, under § 901.04(3)(d), Stats., the trial court could have held a

probable cause hearing on the perjury allegations. Then, if probable cause was found, the trial court could have submitted the allegations to the District Attorney and permit the civil jury to sort out Engel's testimony in the defamation case. Instead, the trial court overrode all the criminal protections and held a civil bench trial in which the Journal was the prosecutor and the civil judge was the trier of fact on perjury. The 14th Amendment requires much more than that when a person has been accused of a crime, is subject to severe punishment and when the trial court is vindicating its own authority.

The Supreme Court has said that persons are entitled to constitutional due process protections before a "badge of infamy" can be hung on them by the State. Wisconsin v. Constantineau, 400 U.S. 433, 437, 91 S. Ct. 507, 510 (1971). When the trial court found that Ms. Schultz was guilty of the crime of attempted subornation of perjury it hung a criminal "badge of infamy" on her. Yet, she did not receive the due process protections she was entitled to receive before being found guilty of a crime. Hanging a criminal "badge of infamy" on her without due process protections was particularly egregious in this case because the defendants were a newspaper and a radio talk show host, neither of whom exerted self-restraint in publishing that criminal "badge of infamy" to their statewide audience. Can any other defendant, while a defamation lawsuit against them is in progress, intimidate an opposing litigant and attempt to influence the outcome of litigation by giving their spin on court proceedings and rulings to a statewide audience?

The due process protections Ms. Schultz should have received before the subornation of perjury "badge of infamy" was hung on her and before she was severely punished for that crime are: adequate notice, an independent prosecutor, an unbiased judge, the criminal burden of proof, and a jury trial. U.S. Const., amend. VI and amend. XIV; F.J. Hanshaw Enterprises, Inc. v. Emerald River Development, 244 F.3d 1128, 1138.39 (9th Cir. 2001). This differs markedly from the elements the court of appeals listed in ¶26 as meeting the requirements for due process.

A. Perjury Is A Crime Under The Wisconsin Statutes

In Wisconsin, perjury is defined as a class D felony in § 946.31, Stats. Solicitation [subornation] or conspiracy to commit a felony is also a Class D felony under §§ 939.30 and 939.31, Stats. The full maximum penalty for a Class D felony is $10,000 or imprisonment for five years or both, § 939.50, Stats. An attempt to commit a felony is also a crime under § 939.32, Stats., but the penalty is one-half that for the completed crime. Thus, pursuant to § 939.32, if a jury in the criminal justice system would have convicted Ms. Schultz of attempted subornation of perjury, as the civil trial court did in this case, the maximum criminal penalty would have been $5,000 or 2 1/2 years in jail or both.

Being accused of a felony is enough to have accorded Ms. Schultz all the criminal procedural due process protections before punishment could be imposed. The disparity, between the maximum criminal penalties for the crime of attempted subornation of perjury and the punishment imposed by the civil trial court, in the instant case, demonstrates the reasons those procedural due process requirements exist.

The court of appeals rejected Ms. Schultz's argument. The court said, "the fact that attempted subornation of perjury is an act that could be prosecuted as a crime does not convert a sanction hearing in a civil case into a criminal trial." [¶ 33]. The supreme court should read that statement in light of the opinion of the Second Circuit Court of Appeals, which has said in Mackler Productions, Inc. v. Cohen [Mackler II], 146 F.3d 126, 128 & 129 (1998):

> Although contempts and sanctions are not identical, the Supreme Court's efforts in Bagwell [512 U.S. 821] to distinguish between civil and criminal contempts can be helpful in identifying those sanctions that demand criminal procedural protections....[S]anctions and contempts

> raise certain similar concerns. Whether or not a finding of contempt is involved, unfairness and abuse are possible, especially if courts were to operate without any framework of rules or caps on their power to punish. In either case, the individual bears the risk of substantial punishment by reason of obstructive or disobedient conduct, as well as of vindictive pursuit by an offended judge. We conclude, notwithstanding the differences mentioned above, that the imposition of a substantially punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case.

B. A Person Accused Of A Crime Is Entitled to Adequate Notice.

It has long been a basic principle of constitutional law that "[a]ll are entitled to be informed as to what the State commands or forbids." Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619 (1939). More recently, in a case dealing with the constitutionality of punitive damages in a civil case, the Supreme Court said that the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a State may impose." Even when a sanction is determined by a jury, in *Gore, 517 U.S. at 559-60,* the U. S. Supreme Court has established three guide posts to determine if notice of the magnitude of a punitive sanction satisfies the 14th Amendment Due Process Clause: the degree of reprehensibility of the conduct; the difference between the sanction and the civil or criminal sanctions that can be imposed for comparable misconduct; and the harm or potential harm suffered in relation to the sanction. When the disparity is great, notice of the magnitude of the punishment does not satisfy the 14th Amendment Due Process Clause.

Taking into consideration the dismissal and the monitory punishment, in the instant case, the punishment was 234 times that of the statutory punishment for attempted subornation of perjury.

The hearing conducted by the civil trial court judge pursuant to the Journal's Motion to Dismiss was labeled an "evidentiary hearing," pursuant to § 901.04, Stats. That statute is meant to be an evidentiary housecleaning statute. If that is not its purpose, and instead it authorizes a court to circumvent a civil jury trial by conducting a bench trial or to circumvent a criminal trial by conducting a civil bench trial, then § 901.04 is unconstitutional.

The lack of notice to Ms. Schultz is further demonstrated by the confusion over what kind of a proceeding this was. [R.203:7-8]. Ms. Schultz had every reason to believe that the proceeding was being conducted as a summary judgment proceeding with all inferences to be drawn in her favor (although a judge is not supposed to adjudicate facts in summary judgment). [R.203:7].

Lack of notice is also shown by the fact that even the judge did not know what burden of proof to apply for his findings. It was not until after the proceeding that he asked the Journal what burden of proof he should use. [R.203:6]. In another hearing, when Ms. Schultz's attorney objected to the lack of notice on the burden of proof, the judge said, "You never asked." ®.208:39-40).

The judge could legitimately have used § 901.04(3)(d), Stats., to hold a hearing on the Journal's Motion to Dismiss, if he had treated it as a probable cause hearing on the perjury allegation against Ms. Schultz. However, the minute the judge decided there was probable cause, he was required to afford Ms. Schultz all the procedural protections appropriate to a criminal case. If the perjury allegation had been referred to the criminal justice system, the civil judge could have continued with the scheduled defamation trial, or he could have adjourned the defamation case until the criminal

proceedings were complete. However, the Constitution prohibits severe punishment without procedures appropriate to a criminal trial.

Thus, the court of appeals in this case did not adequately consider the constitutional issue of notice in saying that Ms. Schultz's due process challenge was "disingenuous" [¶25]. The court said her notice came from the Journal when they labeled their Motion as a Motion to Dismiss. [¶25]. The court of appeals also said she had notice because her attorney acknowledged, during argument, that the case could be dismissed if Engel were believed. [¶25]. However, the court of appeals ignored the basic principle that legal notice to a person accused of a crime is not given by the label on a civil opponent's motion or by the fact that her attorney acknowledges that a judge has threatened to dismiss her case.

Even if the trial of Ms. Schultz had been labeled a "contempt" hearing. it would not have passed constitutional muster because the "contempt" would have involved activity outside the presence of the court, on a criminal matter, and there could be no opportunity to remedy or purge the "contempt." Therefore, it would have constituted criminal contempt rather than civil contempt. Criminal contempt cannot be tried without affording the accused the procedural protections appropriate to a criminal case. Bagwell, 512 U.S. at 831-34; In re Michael, 326 U.S. 224 (1945); Ex parte Hudgings, 249 U.S. 378 (1918).

C. A Person Accused Of A Crime Is Entitled To An Independent Prosecutor.

Ms. Schultz's opponents in the civil defamation case were her prosecutors on the perjury allegation. In Young v. Vuitton, 481 U.S. 787 (1987), the Supreme Court reversed a criminal contempt conviction because the defendant's attorneys, who complained that plaintiffs had broken an injunction, were appointed as special counsel to represent the government in the investigation and prosecution of a criminal contempt action against the plaintiffs. The Supreme Court

concluded that the error of permitting an interested party to prosecute contempt was error that was so fundamental and pervasive that it required reversal without regard to the facts or circumstances of the case. Young, 481 U. S. at 809.

In the instant case, the Journal, although not officially appointed as prosecutors, acted as the prosecutors of their own perjury accusation. They were responsible for gathering the evidence, investigating the charges, presenting witnesses to prove the charge and for arguing that misconduct occurred. In Young, there was at least the protection of a jury trial which moderated the harm caused by the defendant acting as a special prosecutor. In the instant case, there was no jury. The question is not whether actual prejudice occurred by allowing the Journal, with conflicting loyalties, to be the prosecutor. The question is whether it presented the opposite of the appearance of justice. Young, 481 U.S. at 811-12. Moreover, in this case, the appeals court found it "troubling" that Engel could have been trying to "sell his testimony to the highest bidder" when he asked the Journal and Sykes for money before his deposition.¶39 That is precisely why the Journal should not have been acting as prosecutors in the instant case. It came out at the perjury trial that Clary Engel had attempted to get money from the Journal before his deposition. Yet, Engel lied to cover this up during his deposition.[R:A-AP:544-45] Moreover, during the criminal proceeding, Engel repeatedly lied about his meetings and contacts with Journal lawyers.[R:A-AP:413,491,498,499] This, however, was not discovered until after the proceeding when Journal billing records indicated their many hours spent in mock trials and prep sessions with this witness. A five hour mock trial between a non-party witness and a prosecutor, with a high financial stake in a case, does not lend to the appearance of justice.

D. A Person Accused Of A Crime Has A Right to An Unbiased Judge

A judge cannot vindicate his own authority because it is he who has been offended. A judge who finds that his

dignity has been offended cannot judge the person who offended it. The Ninth Circuit Court of Appeals has explained that this is why the offended judge cannot use his "inherent powers" to be the factfinder regarding attacks of a criminal nature on the judicial process. Hanshaw, 244 F.3d at 1137, 1139.

In addition to this general principle, there is evidence in the record of this case that shows the judge, while vindicating his authority, was biased in favor of the Journal. During the trial, Ms. Schultz was asked why some documents she was shown did not mention anything about a political campaign she was involved in [R.202:35-36]. She answered, "Why would they say that?" The court interposed, "You don't get to ask questions here. You only get to answer them." [R.202:36].

Later, the court commented on a difference between the answer plaintiff had just given to a question and the answer she had previously given to a similar question from the court. The plaintiff explained that the court had asked the question with the word *afterwards*. The question she had just answered asked what happened *before* the event in question. After the plaintiff's explanation, the court commented, "Oh, what tangled webs we weave." [R.202:105]

During plaintiff's direct testimony, the court kept her from giving her full response to defendants' allegations, by instructing her to limit herself to Yes and No answers, telling her she was supposed to pretend she was in the Army [R.202:79-80]. Yet, in its decision, the court criticized her for sometimes giving long answers and sometimes giving short answers [R. 203:80-81].

Additionally the judge took hearsay testimony from Joseph Wall, [R.200:83-96]. Mr. Wall at that time was Assistant U.S. Attorney, [R.200:83], and is now a judge. Mr. Wall's sister was Clary Engel's girlfriend. [R.200:83]. He testified that Clary Engel came to him with the story about Ms. Schultz trying to suborn perjury he took Clary Engel directly to Foley &

Lardner, the Journal's attorneys, [R.200:90;130:Ex.8].[6] It is doubtful that anyone who did not have the legal position that Mr. Wall had would have been able to offer this hearsay testimony. What is more important is that the trial court relied on the stature of Joseph Wall in its decision and accorded credibility to his testimony, [R.203:74]. If this was not actual bias, it, nevertheless, had the appearance of bias.

Furthermore, the Supreme Court recognized the danger of allowing a judge to adjudicate a perjury allegation when it ruled that a judge's contempt powers do not extend to perjury. In the case of In re Michael, 326 U.S. 224, the Supreme Court explicitly held that, even when the perjury was done in the presence of the court, a civil court could not try and punish the perjurer unless the perjury were accompanied by the "element of obstruction to the Court in the administration of its duty." In re Michael, 326 U.S. at 228. The perjurer requires the protections of the criminal process unless the "obstruction" element is present. The allegation against Ms. Schultz was that she attempted to suborn perjury outside the presence of the court from a person who was never proffered to the court as a witness. Therefore, the element of obstruction did not exist.

E. A Person Accused Of A Crime Is Entitled To The Criminal Burden Of Proof

The court of appeals in ¶33 and ¶34 approved only a civil burden of proof for the allegations of criminal conduct against Ms. Schultz. The civil court found Ms. Schultz guilty of perjury by clear and convincing evidence after the Journal told the court this is the burden it should use. [R.203:6]. In the criminal justice system, Ms. Schultz would have been accorded the protection of the criminal burden of proof - beyond a reasonable doubt. Moreover, the burden of proof would not have depended on what the opposing party told the judge the burden should be. Additionally, she would have known the

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[6] It is curious why a law enforcement officer would not have taken Clary Engel to the District Attorney instead of to Foley & Lardner.

burden of proof before the trial began, and her attorney would not have had to ask the judge what it was. [R.203:6]

F. A Person Accused Crime Has A Right To A Jury Trial

Because Ms. Schultz was accused of a crime, she had a right to a jury trial. U.S.Const., amend VI. Although the perjury proceedings had been billed as an "evidentiary hearing" under § 901.04, Stats., the judge kept referring to the proceeding as a "trial." [R.210:37;208:59;204:58,86]. Moreover, Ms. Schultz's attorney asked for a jury trial when it became apparent that the four-day hearing had not been an "evidentiary hearing" because the judge was going to make more than an evidentiary decision on credibility.[R.203:8].

Even if it had been proper to try the perjury allegation in civil court, it would have had to have been done in the civil defamation jury trial that was requested by Ms. Schultz.

III. MS. SCHULTZ WAS DENIED THE CONSTITUTIONAL PROTECTIONS GUARANTEED BY THE 5TH, 8TH, AND 14TH AMENDMENTS, WHEN THE TRIAL COURT TOOK AWAY HER RIGHT TO A JURY TRIAL ON HER VALID CIVIL CLAIM AND WHEN IT ORDERED MONETARY SANCTIONS AGAINST HER WHICH WERE PUNITIVE, SERIOUS, AND NOT CALIBRATED TO DAMAGES.

The court of appeals treated this case as if it were only a dispute over sanctions. [¶ 2]. The appeal in this case is not about whether a trial court can conduct an evidentiary hearing to impose sanctions. This appeal is about whether Ms. Schultz's 14th Amendment procedural due process rights were violated through a civil proceeding that imposed punishment that was severe and criminal in nature. If that proceeding violated her 14th Amendment due process rights, then the punishment that flowed from that proceeding should be

overturned.

However, even if the act that gave rise to the sanctions were not criminal, the sanctions would still require reversal because sanctions that are punitive, serious, and not calibrated to damages require the procedural protections appropriate to a criminal case. Bagwell, 512 U.S. 821; Gore, 517 U.S. 559 (1996); Mackler II, 146 F.3d 126; Mackler Productions v. Cohen [Mackler III], 225 F.3d 136 (2d Cir. 2000); Hanshaw, 244 F.3rd 1128. The direction of the Supreme Court in Bagwell and Gore, and the federal appellate holdings in Mackler and Hanshaw say that, when sanctions are criminal in nature, constitutional protections are required. "We conclude...that the imposition of a sufficiently substantial punitive sanction requires that the person sanctioned receive the procedural protections appropriate to a criminal case." Mackler II, 146 F.3d at 130. "The more punitive the nature of the sanction, the greater the protection to which an individual is entitled." Hanshaw, 244 F.3d at 1137. The prohibition of the 8th Amendment against excessive fines was also violated in this case because the due process clause of the Fourteenth Amendment makes the Eighth Amendment applicable to the states. Cooper Industries, 121 S. Ct. at 1684.

A. Since The Dismissal Of The Defamation Case Was Punitive and Serious And Involved the Taking Of A Valuable Property Right, But Was Not Specifically Authorized By Statute, The Dismissal Required Procedural Due Process Protections Appropriate To A Criminal Case, Even If The Act Giving Rise To The Dismissal Had Not Been Criminal In Nature.

The above cases involved monetary sanctions, not the dismissal of a case. However, the principles they enunciate for monetary sanctions apply also when the sanction is dismissal. The court of appeals itself recognized that dismissal is an "extremely drastic penalty." [¶19, *quoting* Hudson Diesel,

Inc. v. Kenall, 194 Wis.2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995)]. The court also called dismissal a "harsh sanction" [¶9]. Additionally, the court of appeals agreed with Ms. Schultz that there is no statute authorizing the trial court to dismiss the case [¶10]. Moreover, in addition to being a serious sanction, the dismissal was punitive. The trial court explicitly said it was imposing this sanction to punish Ms. Schultz. [R.203:92]. Thus, based on Bagwell, Gore, Hanshaw, Mackler I, and Mackler II, the "harsh sanction" of dismissal should not have been imposed on Ms. Schultz without giving her the due process for one accused of a crime, even if the behavior being sanctioned had not been a crime.

Ms. Schultz argued to the court of appeals that there was no legal authority for the court to dismiss this case. While the court of appeals agreed that there was no statute [¶10], it said that *case law* permits dismissal. The court cited Johnson v. Allis Chalmers Corp., 162 Wis. 2d 261, 273, 470 N.W.2d 859 (1991). Without quoting Johnson directly, the court of appeals said, "the supreme court has held that dismissal is proper only when the plaintiff has acted in bad faith or has engaged in egregious misconduct." [¶9]. However, that statement of the court of appeals misconstrues what the supreme court actually said in Johnson, which was, "dismissal is improper, *i.e.* not "just," unless bad faith or egregious conduct can be shown on the part of the *non-complying* party." Johnson, 162 Wis.2d at 275 (emphasis added). The key word "non-complying" shows that Johnson is not a blanket approval of dismissals for bad faith or egregious misconduct but only approves dismissal when a party fails to obey court orders out of bad faith or in an egregious manner. Johnson concerned a trial court's dismissal of a case for failure of the plaintiffs to comply with the court's scheduling and discovery orders repeatedly over a period of five years. Johnson, 162 Wis.2d at 267. In fact, such a dismissal is authorized by §§ 804.12 and 805.03, Stats., and therefore did not represent a new direction in case law. Since Ms. Schultz did not fail to obey any court orders, the court of appeals' conclusions in this case about "bad faith" [¶14] and "egregious misconduct" [¶48] do not justify dismissal, even if Ms. Schultz had properly been found guilty of the "egregious misconduct"

of "attempted subornation of perjury."

Moreover, under U S. Supreme Court precedent, the dismissal of the case was not necessary to preserve justice. Although there was a perjury allegation against Ms. Schultz, the trial on the merits of the defamation case could have gone forward. In the case of In re Michael, 326 U.S. at 227-28, 66 S. Ct. at 80, the Supreme Court said:

> All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth. Therefore, it cannot be denied that it tends to defeat the sole ultimate objective of a trial. It need not necessarily, however, obstruct or halt the judicial process. For the function of a trial is to sift the truth from a mass of contradictory evidence, and to do so the fact finding tribunal must hear both truthful and false witnesses.

If a trial had taken place during or after the time perjury was being adjudicated in the criminal justice system, the court could have permitted the Journal to call Engel as a witness and could have allowed him to make his perjury allegations before the civil jury.[7] Then the jury could have determined how much weight to give Engel's testimony for the purpose of this civil case. The court of appeals itself says at ¶24 that "It would have been much easier for the circuit court to simply deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations

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[7] Ms. Schultz also made this suggestion in her brief to the court of appeals. Thus, the court of appeals distorts Ms. Schultz's argument when, in ¶19, it suggests that the only alternative to dismissal offered by Ms. Schultz was the suggestion that the circuit court could have prohibited her from calling Engel as a witness at trial. That was only one suggestion made by Ms. Schultz in her Appellant's brief for the court of appeals. Ms. Schultz also made the suggestion she makes here, namely that the court could have allowed the Journal to call Engel to make his perjury allegations. (See Appellant's Brief in Court of Appeals at page 17.)

to the district attorney's office." Not only would it have been "easier." It would have been the proper constitutional procedure in this case.

An additional reason the case should not have been dismissed is because a cause of action, that has accrued, is a vested property right in Wisconsin and is protected by the 14th Amendment's due process clause. Martin v. Richards, 192 Wis.2d 156, 206, 531 N.W.2d 70, 91 (1995). In Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982), and Martinez v. California, 444 U.S. 277, 281-82 (1960), the Supreme Court likewise held that a cause of action is a species of property protected by the Fourteenth Amendment's due process clause.

Additionally, the Wisconsin Constitution, art. I, § 5 and the Wisconsin Statutes, § 805.01(1), give litigants an "inviolate right" to a jury trial in civil actions. The Wisconsin Constitution in art. I, § 3 also provides a special guarantee of a constitutional right to a jury trial in defamation cases. In the instant case, Ms. Schultz's 14th Amendment due process rights were violated when, through an unconstitutional proceeding, that statutory inviolate was taken away.

Thus, because the sanction of dismissal was a serious and even "harsh" sanction, that the trial court imposed for purposes of punishment, without authorization of any statute, Ms. Schultz's guilt of the act that led to this sanction should have been established in a proceeding where she was accorded all the due process protections appropriate to a criminal case, even if the act leading to the sanction of dismissal had not been perjury.

The dismissal is also tainted by the fact that the trial court partially based its dismissal on the incorrect conclusion that he could sanction Ms. Schultz for conduct in a criminal dognapping case that was dismissed before the civil defamation case was filed. The court of appeals said [¶ 18] that it was permissible for the trial court to find that Ms. Schultz had made a previous attempt to suborn Engel's perjury before this civil lawsuit, and to base his punishment on what he

concluded was a pattern of fraudulent behavior. Additionally, the court of appeals said [¶18] that it was permissible for the trial court to consider both the behavior in the previous criminal case, along with the behavior the court found in the defamation suit, when the court assessed sanctions against Ms. Schultz. The court of appeals cited Chambers v. Nasco, Inc., 501 U.S. 57 (1991), for the proposition that "a court may impose sanctions for misconduct that occurred before other tribunals." [¶18].

First, the appeals court misinterpreted Chambers v. Nasco. In that case, there were no sanctions for misconduct before another tribunal. Chambers was sanctioned for disobeying the court's order by going before the FCC to attempt to remove jurisdiction of the case from the court. Chambers, 501 U.S. at 39. Moreover, the FCC is not another "tribunal" and there was no "misconduct" of Chambers before the FCC. Also, in Chambers, there was only a monetary penalty for the violation of the order, not dismissal of the case.

In addition to being wrong about what Chambers actually sanctioned, the court of appeals made a serious constitutional error in ¶18 by concluding that a civil court, in a defamation case, has jurisdiction to find and punish alleged misconduct in a criminal dognapping case. This was a clear violation of Ms. Schultz's 14th Amendment due process rights and there is no law anywhere that supports such a conclusion.

For all of the above reasons the sanction of dismissal of the defamation case was unconstitutional even if Ms. Schultz is guilty of attempted subornation of perjury.

B. The Monetary Sanction Of $168,944.97 Was Punitive Serious, And Not Calibrated To Damages And, Therefore, Required Procedural Due Process Protections Appropriate To A Criminal Case

We have found no case where a court, under its inherent powers, punished a litigant by taking away meritorious claims and by imposing monetary sanctions not calibrated to damages. Even the court of appeals said it may not have imposed a "dual sanction." [¶53]. Yet, the court of appeals upheld the monetary sanction of $168.944.97.

In the recent 9th Circuit case of Hanshaw, 244 F.3d 1128, where a litigant was sanctioned for bribing a court official, the trial court, under its inherent powers, held an "evidentiary hearing" on the bribery. On appeal, the 9th Circuit, relying on the Supreme Court case of Bagwell, 512 U.S. 821, a contempt sanctions case, said in Hanshaw at 1139:

> We hold that when a court uses its inherent powers to impose sanctions that are criminal in nature, it must provide the same due process protections that would be available in criminal contempt proceedings. We agree with the reasoning of the Second Circuit in *Mackler Productions*, which held substantial punitive sanctions to be enough like criminal contempt to warrant the same due process protections.

Thus, Hanshaw reversed a $500,000 sanction against the party accused of attempting to bribe the receiver in dissolution of partnership proceedings, even though that party was worth $54 million, because "substantial punitive sanctions [are] enough like criminal contempt to warrant the same due process protections." Id. at 1137.

Similarly, Mackler II, 146 F.3d at 128-29 and Mackler III, 225 F.3d at 142, used Bagwell, 512 U.S. 821, as precedent to hold that a court could not impose punitive sanctions for "litigation misconduct" without giving the sanctioned party "procedural protections appropriate to a criminal case." Mackler II reversed a $10,000 punitive sanction and Mackler III later reversed the reduced $2,000 punitive sanction that was

imposed on an attorney, accused of suborning perjury, because the attorney was not accorded the required procedural protections. Thus, although Bagwell was a contempt case, it has been relied on by two federal appellate courts in the context of other court-imposed sanctions. Concerning contempt, and therefore by extension also other sanctions, the Supreme Court said in Bagwell, 512 U.S. at 827, that a fine "totaling even as little as $50 announced after a finding of contempt is criminal if the contemnor has no subsequent opportunity to reduce or avoid the fine through compliance." Id. 512 U.S. at 829. Bagwell also said that criminal contempt requires criminal procedures to prove the contempt before any sanction may be imposed. Bagwell, 512 U.S. at 826. In Bagwell, the Supreme Court reversed a $52 million contempt sanction against a union for more than 400 violations of an injunction during a strike because the sanction was a punitive sanction that was imposed against the union without a jury trial.

Thus, the court of appeals, in the instant case, was wrong when it said at ¶51 that "there is nothing in either Bagwell or Mackler requiring the circuit court to grant a jury trial or apply a reasonable doubt burden of proof before it awarded attorney fees as a sanction." Following Bagwell, Mackler II, Mackler III, and Hanshaw, a sanction as little as $50 announced for the criminal conduct of perjury must be reversed, if the perjury was not established in proceedings giving the protections appropriate to a criminal case.

The court of appeals acknowledged [¶7] that the trial court's reason for the sanctions was "both to penalize the offender and also deter future misconduct." *See also* ¶ 51. In spite of this, the court of appeals concluded that the sanction of attorney fees of $168,944.97 was compensatory and not punitive "because the fees awarded did not exceed the amount that the court determined had been incurred by the Journal and the award was paid to the Journal, not to the State." [¶51]. However, these factors do not, in themselves, make a monetary sanction compensatory rather than punitive.

Mackler II, 146 F.2d at 129, and Mackler III, 225 F.2d at 142, relying on Bagwell, 512 U.S. at 834-38, laid out a number of factors that must be considered in deciding whether a sanction is compensatory or punitive.

1. The intention of the court in imposing the sanction. In Mackler, the trial court had imposed two monetary sanctions, one it labeled punitive and one it labeled compensatory. In the instant case, there were two punitive sanctions. The dismissal of the case was purely punitive and to vindicate the authority of the court. The trial court also said that the monitory sanction was "both to penalize the offender and also to deter future misconduct" [R.203:92] as the court of appeals acknowledged at [¶7]. The Supreme Court has said, "a civil sanction that cannot fairly be said to serve a remedial purpose, but rather can be explained only as also serving either retributive or deterrent purposes, is punishment." United States v. Halper, 490 U.S. 435, 448 (1989). Furthermore, the appeals court concluded [¶12] that the trial court, could impose serious sanctions, to maintain its dignity. In Bagwell, 512 U.S. at 847. Justice Ginsberg, joined by Chief Justice Rehnquist, said that, when the Virginia Supreme Court reviewed the Bagwell case and said that the fines were to uphold "the dignity of the law and public respect for the judiciary," it was enough to indicate that the sanctions were criminal in nature.

Thus, in the instant case, the intent of the sanction was punitive.

2. Whether there is an opportunity to purge the sanction as in civil contempt cases vs. criminal contempt cases. Here, there was no way for Ms. Schultz to avoid the $168,944.97 sanction. There was "no subsequent opportunity to reduce or avoid the fine through compliance." Bagwell, 512 U.S. at 829. In fact, the court even tried to keep Ms. Schultz from appealing the sanction by imposing an indeterminate future sanction of attorney fees and costs if she appealed.

3. The size of the sanction. The appeals court recognized that the sanctions were "severe" and "drastic." [¶¶ 19,2,34]. Bagwell, 512 U.S. at 838, holds that when sanctions are serious and criminal in nature, the disinterested factfinding and evenhanded adjudication of a jury are essential.

4. Whether the sanction is payable to the court or the other party. The fact that a sanction is made payable to the other party does not make a sanction civil. A sanction payable to a private litigant must be to compensate the complainant for "losses sustained" or that sanction is criminal in nature. Bagwell, 512 U.S. at 834; Hanshaw, 244 F.3d at 1138.

5. Whether the sanction was calibrated to damages. This factor from Bagwell, 512 U.S. at 834 & 835, is especially important. If this factor is not present, the sanction is punishment and is criminal in nature. The trial court, in the instant case, specifically found that there was no harm or prejudice to the Journal or to the case. [R.203:94;208:59-61]. In fact, the Journal itself argued that the sanction was for conduct that injured the court, not them as a private party. They said [at R. 27:45-46 for companion Appeal #00-2595]:

> "This was a sanction levied by the court for Miss Schultz's conduct in the action. The court was in a sense the victim....This was a penalty or fine. Really a sanction. And that's how Judge Wasielewski described it. He assessed the fees as a sanction to reflect what he saw was misconduct before the court."

The court of appeals incorrectly concluded that prejudice to the Journal was not a factor to consider [¶16]. In fact, the court of appeals went on to say that a showing of prejudice was not necessary "because the court's judicial integrity was compromised regardless whether the Journal was harmed" [¶16]. Thus, the court was actually saying that the sanction was punishment and so harm to the Journal did not have to be shown. That logic flies in the face of the 14th

Amendment. Moreover, two recent court of appellate court decisions, with final publications pending, have held that prejudice is a determinate factor in imposing sanctions. The trial court made no effort to calibrate the $168,000 fine to damages. Instead, it punished Ms. Schultz by imposing an escalating, unconditional fine that covered the Journal's attorney fees from August 24, 1999 [R.208:59], for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken." [R.208:63]. Even when Ms. Schultz objected to specific items included in the sanction, like $2,772.50 to make a settlement offer to her, the trial court refused to exclude them, relying on its view that Ms. Schultz should not be "the one to profit" from the difficulty in isolating the fees from damages. [208:65-67].

The trial court used the wrong standard of law to determine the sanctions. Instead of applying a damages test to the case, the trial court relied on supreme court Rule 20:1.5(a) to determine if the Journal's attorney fees were reasonable [R.212:96]. Moreover, the court could not have applied the test for calibrating damages, as Bagwell requires, 512 U.S. at 834 & 835, because the trial court had already said there were no damages to the Journal. The court's misapplication of the law caused an absurd result. The court, in effect, rewarded the Journal for convincing it to dismiss Ms. Schultz's valid claim on which he and the Journal placed a multi-million dollar value.[R.208:45;210:64; 212:101-103]. The judge said the two surviving claims "ought to have been heard by a jury and a jury could well have come in with a substantial verdict." [R.212:102]. He continued:

> "The result obtained from the defendants point of view couldn't have been a better result. They got the case dismissed without a trial. It doesn't get much better than that from the defendants point of view. That is a fact that would have to weight heavily also in consideration of the fee charged. This was an excellent result from the defendants point of view. They

did not have to risk going in front of a jury and defending themselves to a jury on this case." [R.212:102-03].

Additionally, the Journal had a duty to mitigate. The court of appeals recognized that "it would have been much easier for the circuit court simply to deny the Journal's motion to dismiss, allow the jury to sort everything out, and perhaps refer the Journal's allegations to the district attorney's office." [¶24]. However, a Journal lawyer testified that he did not mitigate the Journal's fees, by sending Engel to the District Attorney and then letting the defamation jury sort out Engel's testimony, because "I did not believe that to report it to the police or the District Attorney at the time was in the best interest of my client." [R.210:51-52]. The Journal lawyer further testified that the alleged attempt to suborn perjury presented them with an "opportunity" to avoid a jury trial. "There was a risk that those claims would go to a jury. Defamation lawyers don't like juries....When Mr. Engel came forward with his report that Ms. Schultz had attempted to suborn his perjury, it presented us with a good opportunity to avoid a jury so it was very important." [R.210:24-25].

All the above factors combine to show that the monetary sanction was punitive and, therefore, required the court to give Ms. Schultz procedural protections appropriate to a criminal case before imposing such a sanction.

IV. MS. SCHULTZ WAS DENIED THE CONSTITUTIONAL PROTECTIONS OF THE 5TH, 8TH, AND 14TH AMENDMENTS TO THE CONSTITUTION WHEN THE TRIAL COURT ORDERED MS. SCHULTZ TO PAY ATTORNEY FEES AND COSTS THROUGH ALL APPEALS, EVEN THOUGH THE TRIAL COURT EXPLICITLY HELD THAT THIS CASE IS NOT FRIVOLOUS.

In addition to the above sanctions, the trial court, under its inherent powers, also ordered Ms. Schultz to pay the

Journal's fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken" [R.208:63]. The court of appeals affirmed [¶53], even though the trial court had explicitly ruled that the case was not "frivolous." [R.208:53].

In Wisconsin, § 808.03, Stats., gives litigants a statutory right to appeal that is protected by the due process clause of the 14th Amendment. The trial court did not have the inherent power or the jurisdiction to punish Ms. Schultz for exercising that right. While this obvious attempt, at preventing a challenge to the trial court's "inherent power," did not succeed in terrorizing Ms. Schultz from exercising her right to appeal, it made it much more costly for Ms. Schultz to bring an appeal of her non-frivolous case than it costs other litigants in Wisconsin to exercise their substantive right. Thus, it violated the equal protection clause of the 14th Amendment, as well as the due process clause. This ruling also has the absurd result of forcing Ms. Schultz to be responsible for the fees and costs of the remand that the court of appeals ordered for the other plaintiff in this case, Animal Lobby, Inc.

This sanction was also punitive, serious and not calibrated to damages. Thus, under the same precedent as section III above, procedural due process protections appropriate to a criminal case were required before this sanction could be imposed by any court.

V. THE SUPREME COURT SHOULD CONSIDER THE ISSUES OF THE 78 DISMISSED CLAIMS AND THE LIMITED PURPOSE PUBLIC FIGURE RULING WHICH WERE NOT REVIEWED BY THE COURT OF APPEALS.

The court of appeals did not consider the issues of whether the trial court erred in determining that Ms. Schultz was a limited purpose public figure or in granting partial summary judgment on 78 of Ms. Schultz's claims.[¶2]. Ms. Schultz argued to the court of appeals that publicity does not make a person a public figure. Time, Inc. v. Firestone, 424 U.S.

448 (1976). Regarding the 78 dismissed claims, Ms. Schultz relied on the supreme court's opinion in Torgerson v. Journal Sentinel, Inc., 210 Wis.2d 525, 541-42 and n16, 563 N.W.2d 472 (1997), to ask whether the heightened civil evidentiary burden of proof for a finding of actual malice must be considered by a state court when making summary judgment decisions in First Amendment cases.

Ms. Schultz also argued to the court of appeals that actual malice could be proved on some of the dismissed claims.
Space limitations prevent Ms. Schultz from arguing these issues further here, but she does not want to waive them.

CONCLUSION

For all the foregoing reasons, the petitioner, Ms. Schultz, petitions the supreme court to consider whether the 5th, 6th, 8th, and 14th Amendments to the United States Constitution require a civil trial court to give a person accused of subornation of perjury the constitutional procedural protections appropriate to a criminal case before taking any of the following actions:

1. making a finding of guilt regarding attempted subornation of perjury;
2. dismissing the civil case as a punitive sanction for the subornation of perjury;
3. imposing large attorney fees as a punitive sanction for the subornation of perjury;
4. ordering the payment of all future appeal fees and costs as a punitive sanction for the subornation of perjury, even though the case is not frivolous.

If the supreme court takes this case, Ms. Schultz petitions it also to consider the public figure and partial summary judgment issues that the court of appeals did not decide.

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STATE OF WISCONSIN
SUPREME COURT
APPEAL NO. 00-0915

CYNTHIA A. SCHULTZ,
Plaintiff-Appellant

THE ANIMAL LOBBY, INC.,

Plaintiff-Co-Appellant-Petitioner

v.

CHARLES J. SYKES, JOURNAL BROADCAST GROUP, Inc. and **JOURNAL SENTINEL, INC.,**

Defendants-Respondents

PETITION FOR REVIEW OF APPELLANT ANIMAL LOBBY, INC.

ANIMAL LOBBY, INC'S PETITION FOR REVIEW
OF THE OCTOBER 4, 2001 DECISION OF
THE WISCONSIN COURT OF APPEALS, DISTRICT I
APPEAL NO. 00-0915
THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. FRANCIS T. WASIELEWSKI, PRESIDING
CIRCUIT COURT CASE NO. 98-CV-000724

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Was the Court of Appeals decision that the Petitioner did not request a retraction or publication of the true facts from a media defendant, as required by Section 895.05(2), Stats., clearly erroneous?

The Court of Appeals implicitly answered "No"

2. Is a retraction request under Section 895.05(2), signed by a corporate officer and requesting a retraction of libels aimed at both the officer and the corporation, legally sufficient to protect the rights of both the officer and the corporation to sue a media defendant for libel?

Not answered by the Court of Appeals.

3. If a trial court's finding on a material issue is found to be without factual support in the record, is it an abuse of discretion for the Court of Appeals, *sua sponte,* to remand the case for a trial court hearing to determine that issue rather than to reverse the finding as being unsupported by the evidence?

The Court of Appeals implicitly answered "No."

4. Was the Court of Appeals correct in ignoring prejudice or damage to the defendant in evaluating the constitutionality of a substantial sanction imposed upon the plaintiff for misconduct?

The Court of Appeals implicitly answered "Yes."

5. Were the petitioner and its corporate president entitled to a jury trial and other due process protections applicable to criminal proceedings in a hearing in which the petitioner's president was ultimately found by the court to have engaged in conduct constituting a felony and the petitioner and the president were then both punished by dismissal of a substantial lawsuit and the imposition of a substantial

monetary penalty?

The Court of Appeals answered "No."

6. Was the petitioner subjected to an unconstitutionally excessive punishment?

The Court of Appeals answered "No."

STATEMENT OF CRITERIA RELIED ON TO SUPPORT PETITION

1. The question of the degree of due process required to be afforded by a trial court to a litigant in imposing sanctions for alleged misconduct that would constitute criminal activity (subornation of perjury) raises real and significant questions under the 5th, 6th, and 14th Amendments of the Constitution of the United States and Article 1, Sections 1,5,7, and 8 of the Wisconsin Constitution.

2. The court of appeals' decision is in conflict with two recently-decided but yet unpublished decisions of the court of appeals holding that prejudice to the wronged party must be taken into consideration in determining the nature and amount of a sanction.

3. The question of the proportionality of the sanctions imposed by the trial court to the nature of the offense and the amount of harm to the wronged party raises real and significant questions under the 8th Amendment to the Constitution of the United States and Article 1, Section 6 of the Wisconsin Constitution, regarding excessive fines and cruel and unusual punishments..

4. The issues involving the interpretation of Section 895.05(2), Stats., the finding of a dispositive fact by the Court of Appeals without support in the record and without the issue being appealed,, and the exercise of discretion to remand for a rehearing on a factual issue where the movant had failed to meet its burden of proof on that issue at trial raise issues of fairness that constitute other substantial and compelling reasons for review.

STATEMENT OF THE CASE AND APPEAL ISSUES

A. Nature, Procedural Posture, and Lower Court Dispositions of the Case.

The nature of the procedural posture of this case are as stated in the Petition of Petitioner Cynthia Schultz in this matter and will not be repeated here. There are, however, additional facts uniquely relevant to the Petition of the Animal Lobby, Inc. (hereinafter "ALI")

B. Additional Facts

1. Relationship Between ALI and Schultz

ALI is a Wisconsin nonstock corporation, recognized as a charitable corporation under Section 501(c)3 of the Internal Revenue Code. Cynthia Schultz was at all relevant times its president and uncompensated executive director.

2. Notices Given under Section 895.05(2)

ALI did send a notice of the true facts to the *Journal Sentinel* as required by Section 895.05, Stats., contrary to the conclusion of the court of appeals (Ct. App. Decision ¶ 57).[8] Ms. Schultz, on ALI letterhead and identifying herself as the ALI's president, sent such notices on March 3 and March 22, 1996, with respect to the many libelous statements dismissed from the case by the trial court on summary judgment, and sent one on January 19, 1998, again on ALI letterhead identifying herself as its president, repeating all the earlier requests and specifically addressing the alleged libels that were ultimately not dismissed on summary judgment (the "surviving libels"), and

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[8] Future references to the record will be in brackets but the R. will be deleted. References will first give the record number, followed by a colon then the page number, e.g. 45:16. When a record item is in the separately bound appendix, the reference in brackets will be to the appendix and its page, e.g. A-AP:101. References to the court of appeals' decision will be to &#. The decision is in the Appendix bound with this brief.

advising the *Journal Sentinel* that the true facts regarding the surviving libels were, *inter alia,* that

> Neither I nor my organization, the Animal Lobby, had anything whatsoever to do with the videotaping of the killing of the dog referred to by Mr. McCann nor of any other animal for that matter.

These notices appear in the Record at A-App. 320-23 and 332-37.

With respect to those surviving libels, paragraph 78 of the complaint alleged:

> 78. On January 19, 1998, plaintiffs served Journal Sentinel, Inc., with a written demand for a retraction of these statements in accordance with the provisions of section 895.05(2) of the Wisconsin Statutes. No retraction was published within the reasonable time provided in that statute.

The defendants gave the following answer:

> 78. Admit that defendant Journal Sentinel Inc. received a communication dated January 19, 1998, from Plaintiff Schultz; admit that no retraction has been published; and deny the remaining allegations of paragraph 78.

Identical allegations were made with respect to the March 3 and March 22, 1996 notices, and the defendants gave identical answers.

The defendants thus admitted that the January 19, 1998, and March 3 and March 22, 1996 notices were given. The adequacy of those notices under Section 895.05(2), Stats., was never made an issue in any motion and was never ruled on by the trial court.

The court of appeals stated, however, that "The Journal denied in its answer that ALI had demanded a retraction, and that was all it was required to do. Therefore, because ALI never demanded a retraction from the Journal Sentinel, its claim against the Journal Sentinel must be dismissed." (¶ 57)

3. No Evidence of Wrongdoing by ALI

No defendant ever alleged that ALI had committed perjury nor subornation of perjury, and Judge Wasielewski never made any such finding. Nonetheless, Judge Wasielewski dismissed ALI's surviving claims because of his finding that *Ms. Schultz* had suborned perjury. The court also made ALI jointly and severally liable for the $168,944.97 monetary sanctions, plus appeal fees and costs, that it imposed because of that finding about Ms. Schultz. ALI and Ms. Schultz moved for reconsideration with the trial court after the four-day bench trial, arguing among other issues that ALI had never been found guilty of subornation of perjury. The court's response to the Motion was that it was denying the Motion "out of hand." (R:207:2)

ALI and Ms. Schultz filed separate briefs on appeal. Concerning ALI, the appeals court concluded that there was no evidence in the record showing that ALI was guilty of suborning perjury. However, the court of appeals ordered the case remanded to the circuit court for it to consider whether Ms. Schultz's subornation of perjury can be imputed to ALI.

ARGUMENT

I. DISMISSAL OF ALI'S CLAIMS AGAINST THE *JOURNAL SENTINEL* FOR FAILURE TO GIVE THE NOTICE REQUIRED UNDER SECTION 895.05(2) WAS CLEAR ERROR.

A. The record established that ALI did request retractions from the *Journal Sentinel*.

The Court of Appeals committed clear error when it concluded that "the Journal denied in its answer that ALI had demanded a retraction, and that was all it was required to do. Therefore, because ALI never demanded a retraction from the Journal Sentinel, its claim against the Journal Sentinel must be dismissed."

The "retraction letters"[9] are in the record, as is the Journal's admission that they were sent. The most that can be said of the pleadings on this issue is that whether the retraction requests were adequate under the statute is an open question.

The plaintiffs alleged that they sent letters complying with section 895.05(2). The defendants admitted that the *Journal Sentinel* received them, but they "den[ied] the remaining allegations." At most, that general denial joins issue on the question of whether, legally, the requests complied with the statute. Since the existence of the requests is admitted and they are in the record, interpreting their legal import is a matter of law. The appeals court however made what can only be characterized as an erroneous finding of fact when it concluded that no retraction request had even been made. The trial court never so held, the defendants denial at most raised a legal issue, and the plaintiffs certainly never conceded the point.

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9 We will refer to them as retraction requests for convenience. They requested, as provided by the statute, either a retraction or the publication of the statement of true facts presented by Schultz and ALI.

The court of appeals, ignoring the admission by the Journal and the presence of the retraction requests in the record, held that it was free to dismiss ALI's claims against the Journal for "failure to make the request" because "the notice requirement of the statue is a condition precedent to the existence of a cause of action for libel where the statute applies, and a circuit court is not competent to hear the claim until the condition is met." (¶ 57.)

The appeals court addressed this issue in response to a footnote in the Defendants' Brief to the appeals court, which raised the issue for the first time by simply stating: "Lack of statutory pre-suit demand by ALI is itself grounds for dismissal of ALI's claims against the newspaper." (Respondent's Brief, p. 32). Not only did the plaintiffs rebut this (see ALI's Principal Brief, p. 20), but it was clear in the record that the requests had in fact been made, both on behalf of Schultz and on behalf of ALI. If the court of appeals had the right to make this gravely dispositive factual finding *de novo*, it also had the obligation to look at the record *de novo* to see if it was supported. It was not. ALI has been deprived of a substantial cause of action,[10] in total disregard of facts in the record, and without a fair opportunity to argue the point. Both the trial court and the appeals court apparently regarded it as small matter. It is huge to ALI.

B. Dismissing ALI' claims against the *Journal Sentinel* for a failure to request a retraction violates the Due Process Clause of the Constitution.

A cause of action is a vested property right, protected by the Due Process Clause of the 14th Amendment. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *Martinez v. California*, 422 U.S. 277, 281-82 (1960); *Martin v. Richards*, 192 Wis. 2d 206, 531 N.W.2d 91 (1995). The dismissal of ALI's

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10 The trial court acknowledged that the surviving claims were substantial. He characterized them as claims that "ought to survive," and opined that "a jury could well have come in with a substantial verdict here." (212:101-103).

claims took away a valuable property right. Taking it away because of an alleged failure to make a proper demand should have involved proper notice, a fair hearing, and a deliberated decision. ALI had none of these on this issue.

C. A retraction request under Section 895.05(s) signed by a corporate officer, requesting a retraction of libels aimed at both the officer and the corporation, is legally sufficient to protect the rights of both.

The import of the retraction requests as requesting a retraction on behalf of both petitioners seems self-evident to us from the documents themselves, and the failure of the court of appeals to recognize that is clear error and should be reversed. At very least, though, ALI is entitled to be heard on, and to be given a decision on, whether or not a letter sent under Section 895.05(2) by its president, addressing libels aimed both at her and at it, was legally sufficient to protect the rights of both. The record is clear and this Court should rule as a matter of law that the requests were sufficient.

D. The *Journal Sentinel* Waived Its Right to Raise This Issue.

The appeals court's justified this taking by characterizing the alleged failure to give the required notice as a failure to establish a jurisdictional condition precedent to the existence of the cause of action. We agree that giving the retraction notice was a condition precedent to a libel action against the Journal. But if it is jurisdictional, it a procedural requirement and unlike personal jurisdiction, it can be waived. The defendants had months to bring motions to dismiss. They brought two exhaustive summary judgment motions. In neither of them did they allege a deficiency in the notice. By the time the argument first crept into their footnote, the deadlines for dispositive motions imposed by statute and by the scheduling order had long passed. Had they raised this issue on time, it would have easily been defeated. The appeals court should not address issues that were not raised before the trial court.

II. REMANDING ALI TO THE TRIAL COURT TO RE-DETERMINE ITS LIABILITY AFTER A FULL HEARING IN WHICH ITS ADVERSARY FAILED TO PROVE ITS CASE VIOLATES ALI'S CIVIL PROCEDURAL RIGHTS.

The remand of ALI to the circuit court to determine if Ms. Schultz' actions should be attributed to ALI presents issues of procedural fairness even beyond those that are raised by Ms. Schultz. The first issue is whether, after having gone through a full-blown hearing that the court of appeals has now ruled was fully adequate to try the issues, ALI can be forced to go back and be tried again because the prosecuting party failed to put on evidence to prove its case against it.

The appeals court acknowledges not only that the circuit court made no factual findings adverse to ALI (¶ 54), but that the appeals court itself looked at the record and was likewise unable to find any factual basis for holding ALI liable for Schultz' actions. (*Id.*) The court of appeals regards this simply as an erroneous exercise of discretion by the trial court. (¶ 55). We submit that it is rather a failure of the Journal to meet its burden of proof. The remedy for a failure to support a claim with evidence in the record is dismissal. Instead the court of appeals is sending ALI back to court to give the Journal another chance to get it right. If the evidentiary hearing was complete and fair enough convict Schultz and to deprive ALI and Schultz of their right to a jury, it was certainly also complete enough to deprive the Journal of the unprecedented right to supplement its evidentiary presentation after the case is over and this issue is lost.

III. THE SANCTIONS IMPOSED ON ALI VIOLATED ITS RIGHTS TO DUE PROCESS.

A. The Sanctions were Criminal in Nature.

The appeals court's remand order reeks of double jeopardy. The appeals court is wrong when it concludes that the evidentiary hearing and sanctions were not penal in nature.

At the outset, even the appeals court recognizes that the sanctions were "severe" (¶ 53) and "drastic." (¶19) They included (1) dismissal of a lawsuit that had a good chance of a "substantial" verdict on the eve of trial after months of intensive litigation, (2) a fine of $168,000 imposed upon a charitable organization that cares for abused animals, and (3) an order that all the costs of appeals and further proceedings would be added to the award "for as long as the issue is alive, until there is a final judgment entered from which no appeal is taken." (R:208:63). Such a sanction should not be characterized as nonpunitive without at least some careful analysis. The analysis given by the court of appeals is narrow and flawed.

The court of appeals concluded that *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), and *Mackler Prods., Inc. v. Cohen*, 146 F.3d 126 (2d Cir. 1998) are "inapposite." (¶50) To the contrary, they are most instructive. They establish not only that the courts have great difficulty defining the distinction between civil and criminal sanctions, but that the analysis must involve a number of factors affecting the character and purpose of the sanction. They also illustrate that constitutional principles dictate that the distinction be carefully made.

In those cases the courts considered as major, but not exclusive, element in the analysis, whether the monetary penalty "compensates the complainant for losses sustained." (*Bagwell*, 512 U.S. at 829, citing *U.S. v. Mine Workers*, 330 U.S.258, 303-04 (1947). If the purpose of the penalty is to compensate the complainant, it is more likely to be regarded as civil. If not, it is more likely regarded as criminal, and the due process requirements and burden of proof applicable to criminal trials are applicable to the proceedings.

The fact that a monetary sanction is payable to the complainant rather than to the court, however, is not necessarily dispositive of the question of whether the sanction is compensatory. As *Bagwell* intimated, in imposing a compensatory sanction the trial court should "calibrate the fines to damages caused by the [offending party's]

contumacious activities...." *Bagwell*, 512 U.S. at_834. *Mackler* recognized this by vacating and remanding a sanction of $45,000 that was intended to be compensatory, because the record did not support the conclusion that the sanctionable actions caused damage in that amount. *Mackler*, 225 F.3d at 146. Similarly, in *F.J. Hanshaw Enterprises v. Emerald River Development*, 244 F.3d 1128 (9th Cir. 2001), the 9th Circuit concluded that a $200,000 award payable to the wronged party was compensatory and thus civil in nature only because it "was meant to offset the expenses [the movant] incurred because of [the other party's] misconduct." Those expenses were the additional attorneys fees incurred because a bribe attempt had prolonged a receivership by nearly six months. *Id.* at 1142.

Unlike *Mackler* and *Hanshaw*, the penalty imposed against ALI and Schultz was not meant to compensate for damage and expenses caused by their alleged wrongful acts. The defendants' rights were in no way damaged by the claimed subornation of perjury. Judge Wasielewski ruled that the plaintiffs' lawsuit was one that "ought to survive," that it "ought to have been heard by a jury and a jury could well have come in with a substantial verdict here." (R:212:102). The result of the alleged subornation was not to damage the defendants but to give them an escape from a dangerous lawsuit that they themselves feared. As Judge Wasielewski stated:

> "Suffice it to say, the plaintiff was looking for a lot of money and the defendants were apprehensive that if this case got to a jury, that there was substantial exposure. The result obtained from the defendants' point of view couldn't have been a better result. They got the case dismissed without a trial. It doesn't get much better than that from the defendants' point of view.... This was an excellent result from the defendants' point of view. They did not have to risk going in front of a jury and defending themselves to a jury on this case."

The $168,000 was measured not by any damage to the defendants, but by the abbreviated cost to them of obtaining a dismissal of a case they and the judge recognized as carrying the risk of a far more substantial loss. That sanction was in no way calibrated to any damage caused to the defendants.[11]

ALI and Schultz, on the other hand, had their valuable and viable case dismissed, losing not only the value of their anticipated verdict and the costs they had incurred in getting a major case to the point of trial, but also the $168,000 the defendants claimed to have spent in winning that victory. The defendants have been awarded relief far in excess of any damage caused to them. Admittedly, the penalties imposed upon Schultz and ALI went to the benefit of the defendants. But they bore no calibrated relationship to any harm caused to the defendants by the plaintiffs and they were by no means compensatory. The defendants were fully compensated by the dismissal itself.

Using the identity of the payee as the sole criterion of whether a sanction is criminal or civil is contrary to the cases that have addressed the issue. *Bagwell* said the "whether a contempt is civil or criminal turns on the 'character and purpose' of the sanction involved," 512 U.S. at 827, and "conclusions about the civil or criminal nature of a contempt sanction are properly drawn ... from an examination of the character of the relief itself." *Id.* at 828. The *Mackler* court stressed that multiple factors had to be considered, including the size of the fine, whether the sanction is intended to be compensatory or

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11 The court of appeals concluded that "whether the Journal was prejudiced is ... not a factor that the circuit court was required to consider." (¶ 16). We wish to point out that this appears to be in conflict with the holdings in two very recent, yet-unpublished, decisions of the court of appeals: *City of West Allis v. Wisconsin Electric Power Co.*, 2001 WI APP 226, 2001 WL 1007947 (September 5, 2001)(where there is no prejudice, a sanction is unreasonable), and *Vis v. Cushman, Inc.*, 2001 WL 1191670 (October 10, 2001)(court must consider prejudice to the complaining party before dismissal for dilatory conduct).

punitive, whether it is based on past wrongful conduct or is intended to coerce future compliance, and whether the party is given an opportunity to purge the sanction. *Mackler*, 146 F.3d at 129. In *Kennedy v. Mendoza*, 372 U.S. 144, 168-69 (1963), the Supreme Court said that in determining whether a sanction is penal, a court should inquire into whether the sanction has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment (retribution and deterrence), and whether the behavior to which it applies is already a crime. By any number of these tests, the sanction imposed on ALI and Schultz is criminal.

B. Imposing sanctions that were criminal in nature on ALI violated its Right to Due Process.

Although the appeals court recognized that the sanctions in this case were "severe" and "drastic," it nonetheless characterized them as civil in nature, thus depriving the plaintiffs of the protections of due process that would apply to a criminal sanction. That is a dangerous precedent. It was Judge Wasielewski, not a jury, who made the finding that Schultz had engaged in criminal conduct, and it was he who imposed the sanctions both on Schultz and on ALI for that conduct. As Justice Scalia stated in his concurrence in *Bagwell*, "That one and the same person should be able to make the rule, to adjudicate its violation, and to assess its penalty is out of accord with our usual notions of fairness and separation of powers. .... And it is worse still for that person to conduct the adjudication without affording the protections usually given in criminal trials. Only the clearest of historical practice could establish that such a departure from the procedures that the Constitution normally requires is not a denial of due process of law." 512 U.S. at 840.

The cases that have addressed the subject give no such historical clarity to support what Judge Wasielewski did. At best, the sanctions he imposed may have had characteristics of both civil and criminal nature. "Where ... a judgment of

contempt contains an admixture of criminal and civil elements, 'the criminal aspect of the order fixes its character for purposes of procedure on review.'" *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770,780 (9th Cir. 1983), citing *Penfield Co. of California v. Securities & Exchange Commission*, 330 U.S. 585, 591 (1947). "Similarly, where the fine imposed is part compensation and part punishment, the criminal feature dominates and fixes its character for purpose of review." *Id.* at 778-79, citing *Nye v. United States*, 313 U.S. 33, 42-43 (1941).

The Supreme Court in *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 444 (1911) ruled that where the act of contempt is also a crime, as is the case with Schultz, the defendants must be presumed innocent, proved guilty beyond a reasonable doubt, and accorded the right to refuse to testify against themselves, all in recognition that the penalty is criminal in nature.

C. The sanction imposed upon ALI was an excessive punishment in violation of the 8th Amendment of the U.S. Constitution and Article 1, Section 6 of the Wisconsin Constitution.

The 8th and 14th Amendments prohibit state courts from imposing excessive fines and cruel and unusual punishments. Article 1, Section 6 of the Wisconsin Constitution has the same prohibition. Fines and punishments must be proportional to the offense being sanctioned, and appellate courts must review the question *de novo* when a party claims that a sanction is grossly disproportional to the gravity of the offense. *Cooper v. Leatherman*, 121 S.Ct. 1678 (2001). In determining whether a punishment is grossly excessive, the reviewing court must look at (1) the degree of reprehensibility of the conduct, (2) the difference between the sanction and the civil or criminal penalty provided by law, and (3) the amount of harm or potential harm suffered as compared to the sanction. *BMW Of North America, Inc. v. Gore*, 517 U.S. 559-60 (1996).

While acknowledging the severity of the dismissal, and of the open-ended accumulating cash sanction, the court of appeals made no effort to evaluate its appropriateness under these or

any other standards. If it had, it would have had to reconcile the still-growing $168,000 sanction (and dismissal of the suit itself) with the $5,000 maximum penalty for attempted subornation of perjury (See Sections 946.30, .31, & .32, Stats.), in light of the fact that the defendants benefitted, rather than were damaged, by the misconduct.

With respect to ALI, the disproportionality is even greater. There is nothing in the record whatsoever to suggest that ALI even committed misconduct, much less deserved to be punished for it.

IV. CONCLUSION

The court of appeals' decision upholding the trial court is wrong. The sanctions in this case were undeniably punitive and criminal in nature. The plaintiffs were denied the due process protections that they were entitled to under the 5th, 6th, 8th and 14th Amendments to the United States Constitution and Article 1, Sections 1, 5, 7, and 8 of the Wisconsin Constitution. This is particularly so with respect to ALI, since the sanctions were imposed upon it without any justification whatsoever in the record.

The decision to remand ALI to subject it to still another bench trial because the Journal elected to ignore it in the first trial is likewise in error. It will only compound the injustice that has already been done.

The decision to strip ALI of its surviving claims against the Journal because of the erroneous conclusion that it did not give a retraction demand that it undeniably did give, is also in error.

The decision should be reversed with respect to ALI, and the case should be remanded for the jury trial that ALI has always sought and continues to deserve.

Date: November 5, 2001

Respectfully Submitted,

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CYNTHIA A. SCHULTZ,
Plaintiff-Appellant,
ANIMAL LOBBY, INC.,
Plaintiffs-Co-Appellants

v.
Appeal No. 00-0915

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP,
and JOURNAL SENTINEL, INC.,
Defendants-Respondents

BRIEF OF APPELLANT ANIMAL LOBBY, INC.

ON APPEAL FROM AN ORDER AND JUDGMENT OF THE CIRCUIT COURT OF MILWAUKEE COUNTY HON. FRANCIS T. WASIELEWSKI, PRESIDING CIRCUIT COURT CASE NO. 98-CV-000724

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STATEMENT OF THE CASE

The Animal Lobby adopts The Procedural Status and Statement of Facts in the brief of appellant Schultz and incorporates them here by reference. Additionally, the Animal Lobby adds the following facts related to the Animal Lobby.

The Animal Lobby, Inc. is a Wisconsin not for profit corporation that was organized in 1994 under 501c3 of the federal internal revenue code. The primary mission of the Animal Lobby is to eliminate animal abuse.

Although the Animal Lobby, Inc. has been referred to as an animal rights organization in the instant case, its philosophy lines up more with animal protection than it does with animal rights. Not all organizations devoted to advancing the care and treatment of animals are animal rights organizations. Most organizations within the animal movement fall under one of the following four categories: animal rights, animal liberation, animal welfare and animal protection. The groups that fall under the category of animal rights believe that animals should have clearly defined rights that are similar to those people have. Groups that fall under the category of animal liberation are groups that involve themselves in freeing mink and engage in various acts of civil disobedience. These groups do not believe that animals should be confined or kept as pets. The animal welfare category includes such organizations as humane societies. Animal protection groups believe that all animals have a right to be treated compassionately and be free from cruelty. The Animal Lobby, Inc. is an animal protection organization that has incorporated some of the animal rights philosophy into its purpose.

Ms. Schultz, the other appellant in this case, formed the Animal Lobby in 1994. She is the president of the organization. Ms. Schultz was also on the board of the WSPCA, another organization she founded, until the trial court, in this case, ordered that the names, addresses and telephone number of all of the WSPCA contributors be turned over to the defendants [66:9]. That prompted her to resign

because of a conflict of interest. In 1999, Ms. Schultz also was elected President of the Society of St. Francis, an Illinois non-profit organization running a no-kill animal shelter in Kenosha. She resigned from that position when the Society of St. Francis had to hire a lawyer to fight defendants' motion to compel discovery of all of the Society's financial records and check books going back to 1996 along with the names, addresses and contribution amounts of all of the Society of St. Francis' contributors [82:1-8].

From March to May of 1996, the Milwaukee Journal Sentinel and Charlie Sykes reported on the Whitefish Bay dognapping described in appellant Schultz's brief. They injected the Animal Lobby into those reports and defamed the Animal Lobby in the following ways. The most damaging of Sykes' and Journal Sentinel's false reports accused the Animal Lobby of paying to have a dog slaughtered and butchered to prove a political point and to get publicity [A-AP:264-65,289]. During the reporting of the Whitefish Bay dognapping, Mr. McCann, of the Journal Sentinel, reported that Ms. Schultz and the Animal Lobby, Inc. had a dog killed and carved up for publicity. [A-AP:289] Immediately after the McCann article, Charlie Sykes accused Ms. Schultz of having the same dog killed and carved up to prove a political point. [A-AP:264-65]. These are the two claims that survived summary judgment when the court ruled that a jury could find that the reporting was done with actual malice. [A-AP:167-167A]

In addition to the above defamation, Sykes also accused the Animal Lobby of conducting a year long a campaign of harassment against a family in Whitefish Bay claiming it was because the Animal Lobby did not like it that the family kept their two dogs outside [A-AP:283-95]. The Journal Sentinel and Sykes repeatedly reported that the Animal Lobby had taken two well cared for and loved dogs from the back yard of their owners because the Animal Lobby believed it was cruel to keep an animal outside [A-AP:283-95]. Claims concerning these libels were dismissed on summary judgment because the court concluded that plaintiffs could not prove actual malice [A-AP:168-192].

ARGUMENT

I. STANDARD OF REVIEW

Did the trial court act without legal authority and violate plaintiff's constitutional rights when it held a bench trial to determine the credibility of witnesses prior to the scheduled jury trial, dismissed the case, and awarded attorneys fees to the defendants, even though the court found that the case was not frivolous under § 814.025, Stats.? Did the trial court fail to apply the proper standard of law to the facts when it granted summary judgment on 78 of the 80 original counts of defamation, and when it ruled that plaintiff is a limited purpose public figure? These are issues of law, which the court of appeals reviews *de novo*.

Whether a plaintiff is a public figure is a question of law and is reviewed *de novo*. *Lewis v. Coursolle Broadcasting of Wis., Inc., 127 Wis.2d 105, 111, 377 N.W.2d 166 (1985)*. The question of whether evidence in the record is sufficient to support a finding of actual malice is one of law and is reviewed *de novo*. *Harte-Hanks Communications, Inc. 491 U.S. 657, 685 (1989)*. Issues of Constitutional fact are reviewed *de novo*. *State of Wisconsin v. Charles J. Hajicek, 230 Wis.2d 697, 602 N.W.2d 93 (1999).*

The Animal Lobby adopts the legal arguments in the brief of appellant Schultz and incorporates them here by reference. Additionally, the Animal Lobby adds the following arguments on the public figure issue, the award of fees, and the actual malice issue.

II. THE TRIAL COURT ERRED WHEN IT DID NOT APPLY THE PROPER LEGAL STANDARD FOR ITS DETERMINATION THAT THE ANIMAL LOBBY, INC. WAS A LIMITED PURPOSE PUBLIC FIGURE.

Immediately after the filing of the complaint in the instant lawsuit, Charlie Sykes and the Milwaukee Journal Sentinel moved to have plaintiffs, Ms. Schultz and the Animal Lobby,

Inc., declared limited purpose public figures for the purpose of the claims in this action [R.4].[12]

The court found that both Ms. Schultz and the Animal Lobby were limited purpose public figures [A-AP:193-202]. In an oral opinion, the court gave reasons why it considered Ms. Schultz a limited purpose public figure [A-AP:195-200]. However, the court never gave reasons why it considered the Animal Lobby a limited purpose public figure. When the court had finished giving its reasons pertaining to Ms. Schultz, it simply stated: "I should add that I have limited some conduct to her. But I -- it applies to the lobbying group as well. I evaluated -- I see no basis to distinguish the two in this evaluation." [A-AP-200].

Since the trial court gave no reasoned basis for its decision concerning the Animal Lobby, the court of appeals must review the record *de novo* to determine whether the Animal Lobby is a limited purpose public figure.

Insofar as this brief will be discussing the arguments that the court used for Ms. Schultz but only applied in passing to the Animal Lobby, the discussion in this brief gives reasons why Ms. Schultz, as well as the Animal Lobby, is not a limited purpose public figure.

The trial court said that it was relying on four cases for its determination that Ms. Schultz and the Animal Lobby were public figures, although the court did not actually spell out how each case applied. The cases are: Waldbaum v. Fairchild Publications, Inc., 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980); Denny v. Mertz, 106 Wis.2d 636, 318 N.W.2d 141 (1982); Wiegel v. Capital Times Co., 145 Wis.2d 71, 426 N.W.2d 43 (Ct. App. 1988); Bay View Packing Co. v. Taff, 198 Wis.2d 653, 543 N.W.2d 522 (Ct. App. 1995). The court seemed to rely on

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[12] Future references to the record will be in brackets, but the R. will be deleted. References will first give the record number, followed by a colon then the page number, e.g. 45:16. When a record is in appellants' joint appendix, the reference in brackets will be to the appendix and its page, e.g. A-AP:101.

these cases only for their three-part test for determining a public figure.

The first element of the public figure test in the cited cases is that there must be a public controversy. The court found that there were two public controversies in the instant case: "the animal rights slash mistreatment public controversies and the Supreme Court election public controversy" [A-AP-195]. The court treated the second of these first and said that there was not "any dispute at all" as to whether the Supreme Court election was a public controversy [Id]. The court said, "Obviously, elected Supreme Court officials has impact outside of those immediate interests in dispute." [Id]. Later, the court considered the second element of the public figure test, the role the plaintiff played in this "public controversy." The court said that, in the supreme court election "public controversy," the role of Ms. Schultz, who was campaign manager for Judge Fine, was "neither trivial nor tangential" because she had been "quoted publicly making statements on behalf of that campaign" and because she had involvement in other campaigns. [A-AP:198]. The third test for a public figure, in the cases the court cited, is that the alleged defamation must be germane to the plaintiff's role in the public controversy. The trial court, in the instant case, never explained how this third test was met in relation to the supreme court election "controversy." It simply said that the issues of the election controversy "meld" with the issues of an animal controversy [A-AP:199].

The problem with the court's application of the three-part public figure test to the "election controversy" is that the court never explained why being a campaign manager and being quoted publicly on behalf of a candidate makes the campaign manager a public figure. Nor did the court explain how this would make the Animal Lobby a public figure. The Animal Lobby had nothing to do with the Fine campaign or any other political campaign. More importantly, the initial defamations in this case had nothing to do with the supreme court campaign. It was only after Charlie Sykes defamed Ms. Schultz and the Animal Lobby in connection with reporting on the

Whitefish Bay dognapping case that he then dragged in Ms. Schultz's work on the Fine for Justice campaign by insisting that Ralph Adam Fine should fire her [A-AP:203-281]. This does not make Ms. Schultz a public figure. Moreover, the fact that Ms. Schultz is founder and president of the Animal Lobby and is also a campaign consultant does not connect the Animal Lobby to her activities as a consultant to a candidate for the Wisconsin Supreme Court and does not permit the Animal Lobby to be defamed in a discussion about a Whitefish Bay dognapping.

As stated above, the court initially found that there were two public controversies: an ongoing controversy on animal issues and the supreme court election controversy. However, the court did not think that the "animal rights controversy" was as clear a public controversy as it found the "election controversy." It said that the "[a]nimal rights controversy is not quite as obvious" and that "there is a lot of room for argument and debate in that regard." [A-AP:196,197]. Nevertheless, the court concluded that Ms. Schultz (and the Animal Lobby) were made public figures by an ongoing "animal rights controversy." The court said this was because there was a "public debate prompted in large measure by Miss Schultz herself as to animal rights" [A-AP:196]. The court continued, "The manner in which these cruelty to animal laws are enforced and the manner in which the community deals with strays, et cetera, certainly in Miss Schultz's mind, and I think that in all it's known, it should be generally recognized, does have impact on the community." The court did not explain how it knew what was on Ms. Schultz's mind. The court's statement that enforcement of animal laws and dealing with strays has an impact on the community is a statement of the obvious without connecting any such impact to a controversy being debated at the time of the defamations in the instant case. In evaluating Ms. Schultz role in the "animal rights controversy," the court said, "She obviously has a central role advocating her position with a view toward influencing the outcome of the controversy; protection of animal rights; enforcement of animal rights statutes; provisions of appropriate animal shelter services" [A-AP:198].

The court did not explain why such advocacy would make Ms. Schultz or the Animal Lobby public figures for the defamations in this case.

The court of appeals should overturn the trial court's public figure ruling since the above summary of the court's opinion shows that the court did not apply the law to the facts of this case when it ruled that Ms. Schultz was a limited purpose public figure. Moreover, the court did not apply a standard of law to the facts when it found that the Animal Lobby, Inc. was a limited purpose public figure. Besides rejecting the trial court's conclusions concerning public figure, the court of appeals should not on its own conclude that Ms. Schultz and the Animal Lobby are public figures because such a conclusion can only be reached if the court mistakes notoriety or previous publicity with public figure status, or if the court permits the very broadcasts and newspaper articles, that defamed the plaintiffs, to create the public controversy needed to make plaintiffs public figures.

In *Wells v. Liddy*, 186 F. 3d 505 (1999), the court did a thorough analysis of the Supreme Court public figure standards in *Gertz v. Welch*, 418 U.S. 323 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); and *Wolston v. Reader's Digest Ass'n Inc.*, 443 U.S. 157 (1979). As a result of the *Liddy* court's analysis and reliance on those cases, the *Liddy* court concluded that the plaintiff was not a limited purpose public figure because defendant did not prove that:

(1) the plaintiff has access to channels of effective communications.
(2) the plaintiff voluntarily assumed a role of special prominence in the public controversy;
(3) the plaintiff sought to influence the resolution or out come of the controversy;
(4) the controversy existed prior to the publication of the defamatory statement; and
(5) the plaintiff retained public-figure status at the time of the alleged defamation.

These criteria have been differently stated in other cases to say that neither publicity, nor newsworthiness, nor involvement in prior public controversies, nor prior access to the media make a plaintiff a public figure. Instead, (1) the alleged defamation must be directly related to an existing controversy not created by the defamatory news article for a plaintiff to be a public figure, and (2) lack of post defamation access to the press indicates lack of public figure status.

A. Publicity and Newsworthiness Do Not Make One a Public Figure

Publicity does not make a plaintiff a public figure. It is not that simple. *Time* magazine tried that tactic but lost the argument in Time, Inc. v. Firestone, 424 U.S. 448 (1976); *see also* Denny, 106 Wis.2d at 646 and n.14. In Firestone, the Supreme Court reminded a very powerful media giant that the mere fact that a plaintiff has been in a lot of newspaper articles does not give a publisher the right to ruin her reputation in the name of the First Amendment. Mrs. Firestone was a prominent and highly publicized society figure. Everyone in Palm Springs was reading about her and her messy divorce. That made no difference. The Supreme Court looked beyond the publicity and concluded that the elements upon which public figure status must be premised did not exist. Similarly, in Liddy, the court determined that Ms. Wells was not a limited purpose public figure for the purpose of the defamations in that case, even though she did have publicity in the Watergate burglary.

The defendants conceded that the plaintiffs in the instant case are not public figures for all purposes [8:17]. Therefore, the distinction between general purpose and limited purpose public figures cannot be blurred. Proving that the Animal Lobby, Inc. or Ms. Schultz have previously been in the news in some limited contexts, proves nothing. The real question is whether in full context (and earlier publicity is only one small part of that context), the falsehoods the defendants broadcast and printed deserve the added defense available to statements about limited purpose public figures. The inquiry does not end with the plaintiff's notoriety. Likewise, newsworthiness does

not make a public controversy or make a person connected to the newsworthy event into a public figure. "A libel defendant must show more than mere newsworthiness to justify application of the demanding burden of *New York Times*." *Wolston*, 443 U.S. at 167-68. The fact that Judge Fine's campaign was newsworthy or the dognapping of dogs in Whitefish Bay was newsworthy, did not make them into public controversies and did not turn Ms. Schultz or the Animal Lobby into a public figure.

B. Involvement In a Prior Public Issue or Controversy Does Not Make One a Public Figure

To qualify as a public controversy, there must have been public debate about the issue of the defamation prior to the defamation. A plaintiff is not a public figure just because public debate was precipitated by the defamation. It is a basic principle of libel law that a person cannot be made a public figure by the publication which defames them. *Hutchinson*, 443 U.S. at 135; *Denny*. 106 Wis.2d at 651. "[T]hose charged with defamation cannot by their own conduct create their own defense by making the claimant a public figure." *Denny*, 106 Wis.2d at 647.

The fact that a plaintiff may have been involved in a controversy at another time or involving another segment of the public does not give a newspaper or radio station the right to libel her or to libel organizations, to which she is attached, on a different issue. Limited public figure means just that --- limited. A limited public figure status in an earlier issue does not splash over into a new issue. Thus, the fact that Ms. Schultz was a campaign manager for Judge Fine does not make her a public figure for discussions about a Whitefish Bay dognapping case.

1. Involvement in a political campaign does not make one a public figure

A political campaign involves a public controversy during the duration of the campaign, the question of which of

two candidates for public office should be elected. An election campaign is an easily isolated controversy. The controversy is limited to the issues debated in the campaign. When the campaign is over, the debate ends. People are no longer discussing any specific question to which the defamatory statement is necessary. Thus, Ms. Schultz's involvement in past political campaigns did not make her a public figure at the time of the defamatory statements in this case.

Neither did Ms. Schultz activities in the Fine campaign make her a public figure. The facts are undisputed that her activities were almost entirely in the background [14:35-40]. She made no public appearances. She conducted no press conferences. She made no TV or radio appearances. She did not write for public consumption. She did nothing to thrust herself into the fray. Her activities were identical to those of Andrew Lawrence in *Lawrence v. Moss*, 639 F.2d 634 (10th Cir.), *cert. denied*, 451 U.S. 1031 (1981). Lawrence was a campaign consultant with a national reputation and considerably more public campaign involvements than Ms. Schultz. He was hired by Orrin Hatch for the race against Frank Moss for a U.S. Senate seat in Utah. Moss called him a "bagman for Spiro Agnew." When Moss argued that Lawrence was a limited purpose public figure because of his long involvement in political campaigns and the publicity he had received in other contexts, the 10th Circuit looked at the nature of his participation in the Hatch/Moss campaign and held that he had not thrust himself into that controversy so as to influence the resolution of the issues involved. The U.S. Supreme Court refused to grant certiorari. If Ms. Schultz became a public figure because she inconspicuously helped promote the candidacy of Ralph Adam Fine for Supreme Court, the basic protections of the First Amendment against slander will be stripped away from a large army of citizens who serve as campaign organizers, treasurers, advisors and consultants for judicial and political campaigns.

Schultz' role in the Fine campaign was identical to that of Lawrence in the Hatch campaign. Lawrence's participation in the Hatch campaign "may have made him newsworthy but

did not transform him into a public figure." *Lawrence*, 639 F.2d at 637,638. Similarly, Ms. Schultz's work for Judge Fine may have made her newsworthy, but it did not transform her into a public figure.

If Ms. Schultz were running for office, any statement impacting on her ability to perform in the position she was seeking would arguably be germane to her fitness for office. But she was not running for office. She had not thrust herself into the public aspect of the campaign, either. But if she had done so, her role in the campaign was exclusively to get Judge Fine elected. Her character and conduct were not among the issues being debated and were irrelevant to any campaign controversy. Not one of the statements made about her by the defendants bore even the slightest relationship to her role in any controversy connected to the election. Certainly the Animal Lobby did not become a public figure simply because Ms. Schultz happened to be on its Board of Directors and also worked for Judge Fine.

2. Involvement as an animal activist does not make one a public figure.

Both Ms. Schultz and the Animal Lobby were involved in the arena of animal rights. Over the years, Schultz and the organization had been involved in a number of controversies involving animal issues that had public dimensions. Most of them were never public controversies in the first place. [8]. However, none of those incidents were any longer being discussed and debated when the defendants published their false statements about Schultz and the Animal Lobby. Limited purpose public figure status does not survive the debate of the specific controversy that gave rise to it. Additionally, while Ms. Schultz may have been mentioned in some of the old issues, the Animal Lobby, on many of them, was not. There is no all-inclusive continuing public controversy about "animal rights" that ensnares all participants into a public figure dragnet. Regarding the Whitefish Bay dognapping, the only public issue was the question of who was the thief and that issue was not being publicly debated. Ms. Schultz was not

mentioned as a suspect in the misdemeanor dognapping until the defendants defamed her and, even then, there was no debate going about who took the dogs. The incident had no public visibility at all until March 3, 1996, when the first Journal article was published; and the banner headline in that flagship article was not the dog theft, but the fact that Ms. Schultz was a suspect and that her "group," the Animal Lobby, Inc., said it was "cruel" to keep dogs outside and were glad the dogs were gone after "Authorities Found No Mistreatment" [A-AP:282]. Even if this incident had contained the elements of a public controversy, the "public" part of it was created solely by the defamation. Thus, even if there was a public controversy surrounding the Whitefish Bay dogs, it was started by the false reporting of the defendants. As explained above, a defamation defendant cannot make a person or entity a public figure by defaming them, and then use that status as a defense.

C. Even if There Is a Public Controversy, It Is Irrelevant If the Defamatory Statements Are Not Germane to the Controversy.

Besides the requirement of a public debate or controversy, the defamatory statements must also be germane to the plaintiff's participation in the controversy in order to provide a public figure defense. *Bay View*, 198 Wis.2d at 679. The statements must have at least some tendency to promote the public debate of the controversy. Otherwise they contribute nothing to the public interest and merely coarsen the arena of the public debate by demeaning one of the participants. Thus, the fact that a plaintiff is playing a role in a controversy about public education does not give a radio commentator carte blanche to accuse her of bank fraud or sexual promiscuity. The fact that Judge Fine was running for office and Ms. Schultz was consulting his campaign did not give Charlie Sykes and the Journal Sentinel carte blanche to defame her. The fact that Ms. Schultz was active in animal issues did not give Mr. Sykes the right to falsely accuse her of a felony or falsely state that she and the Animal Lobby were leading a year-long campaign of harassment against a family because they kept their dogs

outside. Nor did Sykes have the right to make such accusations against the Animal Lobby. If there was a controversy at all, it was the Whitefish Bay dog issue, and that issue was fanned and inflamed by the false reporting by the defendants in this case.

D. Prior Access To the Media Does Not Make One a Public Figure

Access to the media is one of the tests for whether a person is a public figure. However, just as prior involvement in public issues and causes does not make one a public figure, so prior access to the media does not make one a public figure. *Hutchinson*, 443 U.S. at 134. What is at issue in public figure determinations is post-defamation access to the press. The Supreme Court has said that "[t]he first remedy of any victim of defamation is self-help using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Gertz*, 418 U.S. at 344. The Court continued, 'public figures usually enjoy significantly greater access to the channels of communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy." Id. *See also*, *Calero v. Del Chemical Corp.*, 68 Wis.2d 487, 503, 228 N.W.2d 737 (1975).

A limited purpose public figure has, by definition, sufficient presence within the controversy to be able to defend herself in the media. A plaintiff's inability to get the media to report on a rebuttal to the defamation proves that participation in the controversy was trivial and tangential since even the media acknowledge that the participation is not significant enough to report. This is a matter both of logic and of fundamental fairness, particularly if the media that refuse the access are the very ones who created the defamations. Even a plaintiff who strenuously thrusts herself into a controversy is a very powerless private figure if the media chooses to ignore her efforts. Wanting to be a public figure does not make you one.

In the instant case, Ms. Schultz repeatedly requested retractions from the Milwaukee Journal Sentinel. [A-AP:320-24;332-37]. There was no retraction and no printing of her letter to the editor. The radio stations destroyed tapes she requested of Mr. Sykes's broadcasts. Ms. Schultz did appear on Charlie Sykes' broadcast on the day he began slandering her. [A-AP:214-221] However, that was not the "access" contemplated by the Supreme Court, since it did not afford her the opportunity to rebut defamation. Instead, it caused her and the Animal Lobby increased defamation. Mr. Sykes immediately, and for days after, falsely stated that Ms. Schultz had "admitted" on his show to being "up to her eyeballs" in the "campaign" against the family who owned the dogs [A-AP:242]. Then, after reporting every possible item of damaging innuendo against Ms. Schultz and the Animal Lobby, Inc. for months, and after reporting that she had been convicted of a felony, and after refusing repeated requests for retractions, the defendants were absolutely silent when the misdemeanor charges were dropped in the dognapping case. If the defamations had been in any way germane to any public controversy, surely the dismissal would have been germane.

E. There Is No Basis In This Case To Declare Plaintiffs Public Figures

The cases that have upheld limited purpose public figure status have all involved allegations directly pertinent to the issues of the public controversy, being debated at the time, and made in the direct context of reporting about that controversy. The defamations, in this case, by contrast, were nothing more than character assassination. The special privilege in reporting about public figures is intended to give reporters and editors freedom to contribute to the debate of public issues.

The special defamation-law privileges given to the media are strictly limited. They exist because the Supreme Court has decided that the public interest in promoting a vigorous debate of public issues can outweigh the public interest in protecting individuals from attacks on reputation.

A person's right to be free from damaging falsehoods gives way to the right to free-wheeling public debate only when there is in fact a truly public controversy being publicly debated, and only when the damaging statements contribute to that debate. A newspaper or radio station cannot wrap itself in the First Amendment to wage a personal war of falsehood against an individual, even an individual with public visibility. The public interest is in public debate, not in increased ratings or circulation. A finding of public figure status deprives a plaintiff of the basic right to be free from libel, a right that can only fall before a genuine and superior public interest. The Supreme Court has been jealous in protecting both rights and has carefully and consistently resisted attempts by the media to obliterate the one in favor of the other.

III. THE ANIMAL LOBBY, INC.'S CONSTITUTIONAL RIGHTS WERE VIOLATED WHEN IT WAS DENIED A JURY TRIAL UNDER ARTICLE 1, § 5 AND WHEN IT WAS DENIED A RIGHT TO REMEDY UNDER ARTICLE 1 § 9

The rights of the Animal Lobby were violated when the court substituted a bench trial for a jury trial and dismissed the case. Throughout the entire bench trial, which was supposed to be an evidentiary hearing, the Animal Lobby was ignored.

The Animal Lobby was defamed by the Milwaukee Journal Sentinel and by Charlie Sykes. The Animal Lobby's claims survived two summary judgment motions in this case. Plaintiffs addressed the Animal Lobby's interest in their Motion for Reconsideration, but the Court dismissed the motion without comment [126]. In the court's decision to award fees, it never once mentioned the Animal Lobby until the end when the court concluded that the Animal Lobby would be jointly and severally liable for the fees [212:112].

The argument on this issue is more fully developed in the brief of the other appellant, Ms. Schultz. Those legal and constitutional arguments in her brief are incorporated into this brief by reference. Argument on this issue is also contained in

the argument on fees below.

A. The Court Erroneously Made the Animal Lobby and Ms. Schultz Jointly and Severally Liable for Fees.

Defendants filed a motion for fees under 814.025 Wis. Stats. After concluding that this case was not frivolous under 814.025 Wis. Stats., the court awarded to the defendants, as a purely punitive sanction, legal fees of $155,797.31 [212:112, 208:53].

Wisconsin follows the American Rule. Under the well established American Rule, parties to litigation are responsible for their own attorney's fees unless recovery is expressly allowed by either contract or statute, or when recovery results from third-party litigation. Wisconsin courts have strictly adhered to the American Rule. Recently, in *Riccobono v. Seven Star, Inc., 2000 WL 291393 (Wis. App)*, the Court of Appeals affirmed Wisconsin's commitment to the American Rule:

> "....the American Rule, which prohibits a successful party in a lawsuit from being reimbursed for its costs or attorney fees unless there is a contract providing for it or a statutory provision allowing it, is still adhered to in Wisconsin."

After relying on its "inherent power" to dismiss this case, the court found that the case had merit and that it could not award fees and costs under any Wisconsin statute [A-AP:144]. However, the court again relied on its "inherent power" to award $155,797.31 in fees and costs as a purely punitive sanction [208:19-66].

1. The relative wealth of the parties must be considered when punitive sanctions are awarded.

Plaintiff Schultz attempted to have the court consider her personal financial condition along with that of the Animal Lobby. She supplied the court with an expert report that was

based on financial information that the Animal Lobby and Ms. Schultz supplied to an accountant. Defendants objected. The court refused to hear the testimony on the financial information or to allow it into evidence [212:77-82] even though Ms. Schultz tried to explain that, while she could not testify to the expert's conclusions, she was competent to testify to the accuracy of the financial information contained in her expert's reports that relied on her own and the Animal Lobby's tax returns and financial data and on which she had personal knowledge [212:79-83]. When plaintiff's attorney questioned the defendant's general counsel about the wealth of the defendants, the court refused to allow him to complete his inquiry [211:119]. Additionally, before the court awarded fees, Ms. Schultz was forced to testify to her income to assist the defendants in the collection of their anticipated judgment [206:21-22]. She did and she testified that she did not have assets of even $50,000.00 much less $155,700.00. The court asked Mr. Huston, the lawyer for the defendants, if, during the course of litigation, he had received tax returns from the plaintiff. Mr. Huston told the judge that he had not received tax returns in spite of the fact that defendants, through discovery, had Ms. Schultz's tax returns [206:21-22]. Mr. Huston also did not tell the court that he had all of the financial information on the Animal Lobby, Inc. including tax returns, state financial reports, check book stubs and contributor lists [45:1-10, 56:2]. Finally, after the court refused to permit the plaintiff to testify to her own financial status or to the financial status of the Animal Lobby, Inc., the Court, in it's decision [212:107] said:

"There really is not much known about her ability to pay currently such as what her assets, debts, and sources of income are. That has not been fleshed out. So that while she requests that that be taken into account, it is hard to give it much consideration when the evidence on the subject hasn't been fleshed out for the Court."

In *Kunstler, Nakell, Pitts, Robeson Defense Committee v. Britt, 914 F. 2d 505 (1990).* the court held: "It is hornbook law that the financial condition of the offender is an appropriate

consideration in the determination of punitive damages." Furthermore, the court said that "When the monetary sanction is large, however, the parties should generally be given the opportunity to submit affidavits on their financial status." *914 Fd.2d 505 at 45*.

In this case, the court had Ms. Schultz on the stand. The tax information for the Animal Lobby, Inc. had been transposed to an accountant's report and analysis. Yet, the court refused to consider it and refused to enter the reports into evidence [212:76-82]. Furthermore, the defendants knew that the Animal Lobby had no assets and no ability to pay a large judgment because the defendants, themselves, had all of the financial information for the organization [45:1-10, 56:2].

2. The Monetary Sanction Imposed Was Clearly Erroneous.

The court, when determining the reasonableness of the defendants' fees, reasoned that fees should be awarded to the defendants for saving their clients from a jury who "could well have come in with a substantial verdict" on a case that "ought to have been heard by a jury" [212:101-02].

The sanctions of dismissal and attorney fees, in this case, were purely punitive. They were awarded as punishment when the court, after conducting an evidentiary hearing that turned into a criminal bench trial, found plaintiff Schultz guilty of "attempted subornation of perjury," [A-AP:101-03] a crime in Wisconsin.[13]

The United States Supreme Court held, in *International Unions, United Mine Workers of America v. Bagwell, 512 U.S. 821, 831 (1994)*, that when a large sanction is imposed based on misconduct of a criminal nature, sanctions must be subject to

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[13] Perjury is a class D felony under §946.31, Stats. Solicitation or conspiracy to commit a felony is a class D felony under §§ 939.30 and 939.31, Stats. An attempt to commit a felony is a crime under §§ 939.32 but the penalty is one-half that of the completed crime.

the requirement of a jury trial. In *Bagwell*, a state trial court had held a labor union in contempt by reason of numerous unlawful strike-related activities. The trial court fined the union $100,000 for each violent breach of the court's order and $20,000.00 for each non violent breach. See id. At 824. After holding extensive hearings, the court fined the union over $52 million, partly payable to the employer, partly to the court. See id. at 824 The Supreme Court held that the contempts were of a criminal nature and, because of the large size of the sanction, were subject to the requirement of a jury trial which the union had not received. Id. at 838. Furthermore, the Bagwell court found that the fines were not compensatory but were of punitive character because they "were not calibrated to damages caused by the contumacious activities. Id. at 834.

In *Mackler Productions, Inc. v. Frank V. Cohen, 146 F. 3d 126 (2d Cir. 1998)*, the United States Court of Appeals overturned a punitive sanction when, during a non-jury trial, the trial court found that a party in the action had committed perjury on a material matter. The court allow ed the trial to proceed and judged the case on the merits. At the close of the trial, the court referred the matter to the United States Attorney's office for possible criminal charges. After the offender pled guilty to criminal perjury charges, the trial court held an evidentiary hearing on sanctions for contempt of court. Relying in its "inherent authority," the court imposed a $45,000.00 compensatory sanction and a $10,000.00 punitive sanction. The 2nd Circuit Court of Appeals overturned the $10,000.00 punitive sanction saying:

> "A troublesome aspect of a trial court's power to impose sanctions, either as a result of a finding of contempt, pursuant to the court's inherent power or under a variety of rules such as Fed.R.Civ.P. 11 and 37, is that the trial court may act as the accuser, fact finder and sentencing judge, not subject to restrictions of any procedural code and at times not limited by any rule of law governing the severity of sanctions that may be imposed. See

> International Union, United States Mine Workers of America v. Bagwell, 512 U.S. 821, 831, 114 S.Ct.2552, 2559, 129 L.Ed.2d 642 (1994) ('Unlike most areas of the law, where a legislature defines both the sanctionable conduct and the penalty to be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctions the contumacious conduct.") The absence of limitations and procedures can lead to unfairness and abuse." *Mackler, 146 F.3d 126, 128.*

The appellate court, in *Mackler*, further stated:

> "Sanctions and contempts raise certain similar concerns. Whether or not a finding of contempt is involved, unfairness and abuse are possible, especially if courts were to operate without any framework of rules or cap on their power to punish. In either case, the individual bears the risk of substantial punishment by reason of obstructive or disobedient conduct, as well as of vindictive pursuit by an offended judge." *Mackler, 146 F.3d 126,130 [2]*.

The *Mackler* court vacated the judgment and remanded the case to the district court to give the sanctioned party the benefit of procedural protections employed by the criminal process.

The Supreme Court and appellate courts have consistently, held that, in certain sanction proceedings involving criminal conduct, the person facing imposition of sanctions should have the benefit of the procedural protections available to a person charged with a crime including: notice, the opportunity to be heard, the right to a public trial, assistance of counsel, presumption of innocence, the privilege against self-incrimination and the requirement of proof beyond a reasonable doubt. *See Bagwell, 512 U.S. at 826, 114*

S.Ct. at 2556-57.

3. The trial court relied on an erroneous interpretation of case law in concluding that it could assess attorney fees in this case.

The Court relied on Schaefer v. Northern Assurance Company of America, 182 Wis. 2d 148, 513 N.W. 2d 615 (Ct. App. 1994), as authority for awarding fees and non statutory costs under the inherent power doctrine. [208:57-58]. The Court misinterpreted Schaefer. In Schaefer, the case was dismissed on summary judgment when it no longer had merit. In Schaefer there were false pleadings that resulted in a discharge of Northern Assurance from any duty to indemnify or defend any party in the case because of the non cooperation clause in the insurance contract and pursuant to § 632.34, Wis. Stats. The trial court judge did not conduct a trial to determine whether Schaefer had suborned perjury. In fact, when Schaefer *admitted* to committing perjury, the trial court recused itself from the case. The court in *Schaefer* granted summary judgment on a meritless case that had dragged on for nine years. The $8,804.00 in attorney fees and costs were awarded early in the case as a condition for allowing Schaefer to amend his complaint and to proceed to trial. Schaefer does not involve circumstances such as occurred in the case at bar.

IV TRIAL COURT ERRED WHEN IT CONCLUDED THAT THE ANIMAL LOBBY, INC. COULD NOT PROVE ACTUAL MALICE ON THE DISMISSED CLAIMS IN THIS CASE.

After the court found that the Animal Lobby, Inc. and Cindy Schultz were public figures, defendants brought a motion for summary judgment alleging that the plaintiffs could not prove actual malice on any of the claims in this case [6].

The court found that a jury could not find actual malice on 78 of the 80 claims but could find actual malice on two of the claims. The court dismissed 78 claims and permitted two

claims to go to trial.

The court, in its January 1998 decision, concluded that there was "no dispute" that there was a "genuine issue of material fact" that existed in all of the 78 claims [A-AP:175]. However, the court concluded that a jury could not find actual malice, by clear and convincing evidence, on those claims [A-AP:168-192].

The appropriate summary judgment question is whether a reasonable jury could find, by clear and convincing evidence, that Cindy Schultz and the Animal Lobby, Inc. had shown actual malice. *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56 (1986)*. In *Anderson*, the court said that, if a plaintiff can come forward with clear and convincing evidence from which a jury could find actual malice, he is entitled to a trial even if there is conflicting evidence on the issue.

A. Campaign of harassment

The slanders, that fall into this category, belong exclusively to Charlie Sykes and Journal Broadcast Group. Sykes repeatedly reported that Ms. Schultz and the Animal Lobby had "whipped up a frenzy," "complained to authorities," was "actively involved in filing and monitoring the complaints," was "making phone calls to the house," "was up to her elbows in the harassment of the family," "targeted the family with a very concerted campaign" "in a big way" that went on for a year, was "deeply involved in the harassment," and that she "admitted" to this on his show [A-AP:203-81]. None of these statements were true.

At his deposition, Sykes described the imaginary "campaign of harassment" that he repeatedly accused Ms. Schultz and the Animal Lobby of leading:

> Sykes: "During the show I tried to describe in some detail what constituted the campaign of harassment. The fact that before the dogs were stolen the family had been subjected to a

barrage of anonymous notes, calls to the police, complaints to the humane society. The investigation by both the police and humane society found no grounds to remove the animals, but the activists kept on the folks." [A-AP:517]

"You say that animal rights activists, including a very well-known influential political operative in this area, appears to be involved in the harassment campaign. What harassment campaign were you talking about?"

Sykes: "The campaign of anonymous notes, complaints to the police, phone calls, and the subsequent theft of the dogs." [A-AP:516]

Also, at his deposition, Sykes was questioned on how he formed the basis for his reports that Cindy Schultz and the Animal Lobby, Inc. had led Sykes' imaginary year long campaign of harassment:

"Did you have any information as of that time that led you to believe that she had, in fact, complained to the authorities?"

Sykes: "No. I was not alleging so at the time either." [A-AP:518]

"When you say, "they were making phone calls to the house," were you referring to Cindy Schultz?"

Sykes: "The only phone call that I know of is the one call the day of the theft." [A-AP:519]

"Did you have any basis to believe that Cindy Schultz knew about any of the anonymous notes?"

Sykes: "No." [A-AP:516]

Mr. Sykes admitted that he had no basis to believe any of the false and defamatory statements that he disseminated to 40,000 people. Sykes testified that he had police reports that clearly proved that there was no "campaign" of harassment [A-AP:519-20]. Furthermore, Sykes had at least one conversation with Marie Rohde, the author of the articles on which Sykes claims he relied [A-AP:515]. Ms. Rohde testified that she didn't know anything about any "campaign" of harassment:

> "In your investigating and reporting on the Smith dog case, did you at any time come to believe that Cindy Schultz had been involved in a campaign of harassment against the Smiths?"
>
> Rohde: "Did I conclude that?"
>
> "Yes."
>
> Rohde: "No."
>
> "Did you at any time conclude that she was the leader of a group of people that were intending to harass or that were harassing the Smiths?"
>
> Rohde: "No."
>
> "Did you intend to communicate that in the things that you wrote?"
>
> Rohde: "No." [27:80]

When the court granted summary judgment on these claims concerning the "campaign of harassment," it considered them all in a package saying, "This one was more troubling to me....This is a much closer call" [A-AP:181]. If the court would have reasoned each individual claim it would have found why these claims were more troubling to him and would have

found that a jury could find actual malice.

B. Milwaukee Journal Sentinel Article on March 3, 1996

The Milwaukee Journal Sentinel, Inc. published an article concerning two dogs who were taken from a Whitefish Bay back yard. The Animal Lobby, Inc. is an animal protection organization. Thus, the public expects a level of commitment from the organization that could entail hiding out two abused dogs. The Animal Lobby did not sue because the Journal Sentinel reported that Ms. Schultz and the group was suspected in the dognapping. Furthermore, the Animal Lobby, or Ms. Schultz for that matter, have never contended that they were defamed by the statements, in any report, alleging that Ms. Schultz was a suspect in hiding out the dogs, ie "dognapping" [A-AP:321, 332-337]. The statements that made the March 3rd article defamatory were: the headline - "Authorities found no mistreatment," the sub-headline - "Group denies role but says keeping pair outdoors was cruel" and this statement contained in the body of the article - "McDowell (the Milwaukee County humane officer) went to the Smith home January 11 and saw that the dogs had what he considered adequate food, water and shelter."

If the article would have been published truthfully, the article would have read: "Authorities found mistreatment," "Group denies role but says the weather was too severe for the two to be living outside" and "McDowell (the Milwaukee County humane officer) found that the Smiths had violated Wisconsin's animal cruelty laws for failing to provide food and proper shelter to their dogs."

In its decision, [A-AP:185] the court dismissed the claims, concerning the March 3d article, without giving consideration to the concrete and circumstantial evidence from which a jury could conclude that the Journal Sentinel acted with actual malice. The court did not consider that Ms. Rohde, the reporter, testified that, before writing the story, she reviewed police reports and interviewed the detective in the

case [*7, 51-55][14] and that the detective testified that he did not tell Rohde the dogs had adequate food, water and shelter [181:Ex.13 at 83]. The court did not consider that the public records at the Whitefish Police Department and the records in Marie Rohde's own files contained reports that Humane Agent McDowell found that the owners of the dogs had violated § 951.13(1), Stats., by failing to provide food and proper shelter to their dogs [A-AP:310-315]. The court did not consider that other humane society reports, in the police open record files and in Ms. Rohde's own files, indicated that the dogs appeared sick, that the female had scabs on her legs, major hair loss, and sunken runny eyes [27:McDowell, 29, 30, 33, 40]. Furthermore, the court did not take into consideration that, after the Animal Lobby, Inc., faxed a letter to the Journal Sentinel, on March 3rd saying:

> "The lead paragraph in your story said 'animal rights activists were concerned that two dogs might have been mistreated by being kept outdoors.' As told to your reporter, animal rights activists were concerned that two underweight dogs were being kept outside, with inadequate shelter and an inadequate supply of food and water in extreme temperatures. There's a difference!" [A-AP:320]

The Journal Sentinel published yet another article, two days later, in which, referring to the Animal Lobby, it again reported:

> "Whitefish Bay police planned to pursue a tip they received Monday that they hope will lead to the return of two dogs believed to have been

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[14] This affidavit should be with Record Item #7. However, it is actually with Record Item #24. Defendants exhibits for their first summary judgment motion somehow got assembled in the record with plaintiff's response to the first summary judgment motion. Whenever there are cites to exhibits in Record #24 that should be in 7 it will be listed with an asterisk, e.g.[*7].

> kidnapped by animal activists opposed to their being kept outdoors." [27:195]

In her deposition, Ms. Rohde repeatedly contradicted herself and forgot how and when she received the police and humane society reports [24:3-8, 27:3-56]. Telephone records, however, indicated that she had received numerous faxes and calls from the Whitefish Bay police dept. from February 13th until April 2nd [216:Ex. 101-02,107-08] and Ms. Rohde told Mr. Kritzer, counsel for the Journal Sentinel, that all of the police records, involving the complaints about the dogs in the dognapping, were already contained in her own files [A-AP:317]. Additionally, the authorities kept Ms. Rohde and Mr. Sykes well informed on every detail in the misdemeanor dognapping case. In fact, in a memo from the Whitefish Bay police to the Special Prosecutor, appointed to handle the misdemeanor dognapping case, the police made certain that the Journal Sentinel and Sykes would continue to be informed:

> "Thanks again for handling this special prosecution case. Don't hesitate to contact our agency if there comes a time when we can return the favor. Would you please fax a copy of the complaint to the following two sources: WTMJ Radio (Charlie Sykes), and the Milwaukee Journal, (Marie Rohde)." [131:Ex.13:98-99]

Further evidence that the Journal Sentinel acted with actual malice is a July 1996 internal memo at the Whitefish Bay police department that shows the depth of "interest" in the misdemeanor dognapping case:

> Chief Mikulec -- "Marie Rohde from the Journal Sentinel called today to ask if there are any new developments on the dognapping case involving Cindy Schultz. I told her I had heard of none, and Marie found out that the prosecutor, DA Wells has asked the Court for expanded jurisdiction in order to bring

> additional charges against Schultz. The other possibility involves DA Wells establishing himself as a legal authority in order to pursue our cases as it relates to the Madison area. In any event the Journal Sentinel continues to follow that case with interest." [131:Ex. 13:89]

The information contained in the memo described above was false. The District Attorney never asked the court for expanded jurisdiction as Ms. Rohde told the police chief. However, it shows that the Journal Sentinel and the authorities were exchanging information even after the case was "solved."

C. Journal Sentinel Article of May 24, 1996: "The case was solved after members of the animal rights movement apparently broke ranks and turned in Schultz after a story on the situation appeared in the Journal Sentinel." [A-AP-287]

This statement was false. And to state that Schultz' own colleagues "turned her in" added an element of shamefulness and gave even more credence to the Journal Sentinel's misleading stories that portrayed that the Animal Lobby was so far out of the main stream that even their colleagues, in the animal rights community, had rejected them.

The truth is that dog breeders, not affiliated with the animal rights movement, called the police with the location of the dogs. In fact, these particular breeders were more hostile to the animal rights movement than most and had no relationship to the movement or to Ms. Schultz [27:193-196].

Ms. Rohde, the reporter, testified that she relied on her interview with the detective, who investigated the dognapping, for this report [27:Rohde #2 at 34]. However, Detective Przbylinski testified that he told Ms. Rohde that dog breeders and not animal rights activists had called him with the location of the dogs [131:Ex.13 at 80]. Ms. Rohde's own notes, that she supplied at her deposition of July 17, 1998, said "they were breeders." [27:Rohde #1 at 94]. Ms. Rohde also

testified that she had the names and locations of the dog breeders to whom she referred to as the "animal rights activists" who "broke ranks." [27:Rohde #2 at 35].

Thus, Ms. Rohde knew, when she wrote this statement, that Ms. Schultz and the Animal Lobby were not shunned by their peers.

The only reasoning the court gave for dismissing this claim was that it "did not see much to that" and did not take into consideration how this defamatory statement fit into the ıtire article [A-AP:186].

D. Clear and convincing does not mean beyond all reasonable doubt.

Actual malice, is not only provable by direct evidence of knowledge of falsity, which is rare, but by the accumulation of circumstantial evidence that the statements were made recklessly, with a high degree of awareness of probably falsity. Recognizing that it is rare to have direct evidence of the state of a person's mind, the Supreme Court has held that in addressing actual malice "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989).

This circumstantial evidence can include a defendant's failure to make a retraction. *Ball v. E.W. Scripps Co.*, 801 S.W.2d 684, 690 (Ky. 1009); *Peisner v. Detroit Free Press*, 304 N.W.2d 814, 816 (Mich. 1981); *Tavoulareas v. Washington Post*, *759 F.2d* 90, 132 (D.C. Cir. 1985). Despite Schultz' letters clearly pointing out inaccuracies easily verifiable by listening to the tape of her interview by Rohde, the defendants printed neither a retraction nor a statement of Schultz' clarifications. Instead they continued to republish the same falsehoods.

There is other evidence. The consistent resolution of all ambiguities against the plaintiff "in such a way as to cast plaintiff...in the worst possible light and to make for [the

reporter] a front-page story of an episode which otherwise might not have commanded any significant attention ... could amount to evidence of the reporter's reckless disregard for the truth or falsity" of the reporter's articles. Rebozo v. Washington Post Co., 637 F.2d 375 382 (5th Cir. 1981); Tavoulareas, supra, 759 F.2d at 122. *See also,* Ball v. E.W. Scripps, 801 S.W.2d at 686-87 (The way the stories were laid out can be evidence of actual malice). Misstating the evidence to make it seem more convincing or condemnatory than it is can support a finding of actual malice. Westmoreland v. CBS, Inc., 596 F.Supp 1170, 1174 (S.D.N.Y. 1984). Ms. Rohde consistently resolved all ambiguities against Schultz and left out material facts favoring Schultz, even after Schultz promptly pointed out the inaccuracies in the articles. In this way she made many sensational front-page stories that gave more fodder to Charlie Sykes' fire. All but one of the articles, during the dognapping frenzy, were on page one but, when the misdemeanor dognapping charges were dismissed, no article was published.

Finally, evidence of personal animus against the plaintiff can furnish evidence that the defendant was so impelled by other motivations that he deliberately disregarded facts that demonstrated the falsity of his accusations. Tavoulareas, *supra,* 759 F.2d at 118-120. One only has to listen to the tapes [18] to conclude that Sykes' broadcasts reeked of ill will toward Schultz and his motives are not in this record and therefore cannot be put forth in this brief. However, Sykes incessantly repeated his accusations and insisted he would not let them drop even though noone else was reporting what he was reporting. He repeatedly urged Judge Fine to fire Schultz [AP-A:203-281]. While this kind of evidence cannot be dispositive standing alone, it could support a finding of actual malice "when combined with other more substantial evidence of a defendant's bad faith." Tavoulareas v. Piro, 817 F.2d 762,795 (D.C. Cir. 1987).

The Journal Sentinel had its own motives for unleashing its rampage of defamations against Ms. Schultz. She had just stung the newspaper by advising Judge Fine to publicly refuse to participate in their endorsement process.

She called into question the ethics of endorsing in a race where a lawyer from their own firm was running and when the Journal Sentinel had *Maguire v. Journal Sentinel, Inc.* pending in front of the court of appeals. [217]. The Journal Sentinel did endorse the lawyer from their firm and later had to print an embarrassing apology for not informing its readers on their connection [217].

A plaintiff may convincingly prove actual malice by accumulation of many pieces of evidence, no one of which, by itself, is clear and convincing. *Tavoulareas*, 759 F.2d at 122. "Though [a] brick is not a wall,' many bricks are." *Id.* In this case, the plaintiffs have evidence that is both direct and circumstantial that amply supports the conclusion that there is sufficient evidence for the jury to find, by clear and convincing evidence, that the defendants spoke and wrote their defamatory words with knowledge of their falsity and in reckless disregard of their truth.

In *Eastwood v. National Enquirer, Inc., 123 F.3d 1249 (1997)*, Clint Eastwood sued the National Enquirer when it represented that he had given an exclusive interview to the publication. While the contents of the article were not defamatory, the jury found that Eastwood had proved actual malice by clear and convincing evidence and that he was defamed by the mere fact that the Enquirer gave the impression that Eastwood had given an exclusive interview to the tabloid. Affirming the judgment in favor of Eastwood, the court of appeals, relying on circumstantial evidence, held that, even though the Enquirer had relied on another publication, who publicized the interview first, it knew or should have known that the interview was not exclusive to them thus defaming Eastwood with actual malice. The court recognized, in *Eastwood*, that circumstantial evidence is generally the only evidence available in determining actual malice: "As we have yet to see a defendant who admits to entertaining serious subjective doubt about the authenticity of an article it published, we must be guided by circumstantial evidence." There was plenty of that in this case.

The brief of the other appellant, Cynthia Schultz, will treat this matter further, and those arguments are incorporated here by reference.

CONCLUSION

For all of the above reasons, plaintiff asks the court of appeals to reverse the dismissal of this case so that the two claims which two courts decided had merit can be tried. Plaintiff asks the court to vacate the judgment for statutory costs, attorneys' fees and non-statutory costs. Plaintiff also asks the court to reverse the summary judgment on the 78 dismissed claims because plaintiff can prove actual malice, and to reverse the trial court determination that plaintiff is a public figure.

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Pet 228

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

CYNTHIA A. SCHULTZ,
Plaintiff-Appellant,
ANIMAL LOBBY, INC.,
Plaintiffs-Co-Appellants

v.

Appeal No. 00-0915

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP,
and JOURNAL SENTINEL, INC.,
Defendants-Respondents

REPLY BRIEF OF APPELLANT ANIMAL LOBBY, INC.

ON APPEAL FROM AN ORDER AND JUDGMENT OF
THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. FRANCIS T. WASIELEWSKI, PRESIDING
CIRCUIT COURT CASE NO. 98-CV-000724

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Respondents' brief contains many errors which cannot all be addressed in the limited space of this brief. This should not be taken as an admission that everything not addressed is accurate. Volume 3 of appellant's Appendix [B-AP] accompanies this reply brief. Additionally, arguments in Ms. Schultz's reply brief are incorporated here by reference.

I. ANIMAL LOBBY IS A SEPARATE PLAINTIFF FROM MS. SCHULTZ

Respondents argue at p. 31 that the identities of the Animal Lobby, Inc., and Ms. Schultz ran together and that the Animal Lobby had no claim separate from that of Ms. Schultz. This ignores all state law on corporations and on the recognition of corporations as separate persons under the law. Respondents cite State ex rel. Carkel, Inc. v. Lincoln County Circuit Court, 141 Wis.2d 257, 414 N.W.2d 640 (1987), as authority for their position. However, Carkel concerned the substitution of judge statute. Carkel was a corporation that was joined in an action after its only director had presented views in a preliminary contested matter. The Wisconsin Supreme Court ruled that the substitution of judge statute, §801.58(3) precluded the corporation from moving for substitution of judge after it was joined because it was united in interest with its director, who was precluded from moving for substitution of judge.

In the instant case, there is no authority baring the Animal Lobby from seeking separate damages nor a court or jury from awarding it separate damages. Nor is there any authority permitting the dismissal of the Animal Lobby's claims for the alleged attempted misconduct of the co-defendant even if the Animal Lobby was completely united in interest with Ms. Schultz. Since this is not a substitution of judge case, being "united in interest" has no legal significance.

Furthermore, respondents' position was argued in the trial court before two judges and not accepted. In respondents' two summary judgment motions, both Judge Foley and Judge Wasielewski found that the Animal Lobby was identified in

the defamatory broadcasts and articles and that, therefore, should remain in the case. Furthermore, the Animal Lobby, Inc. has separate damages [B:AP:1100] and it was a violation of the Animal Lobby's state constitutional rights to a jury trial and to its' right to remedy when the trial court dismissed claims, that belonged to the Animal Lobby, Inc., without making any finding relating to the Animal Lobby, Inc. Additionally, respondents dropped their cross appeal in this case and have waived their argument that the Animal Lobby, Inc. was not identified in the defamations.

II. RESPONDENTS HAVE WAIVED ANY OBJECTION TO THE LACK OF A REQUEST FOR RETRACTION AND NO REQUEST FOR RETRACTION IS REQUIRED FOR DEFAMATORY RADIO BROADCASTS.

Although respondents argue that the Animal Lobby and Ms. Schultz were united in interest, they argue at footnote 5 that Animal Lobby should have sent Journal Sentinel, Inc. a separate request for retraction from that of Ms. Schultz. Even if that was a requirement for Animal Lobby in this case, defendants never before raised this issue. Therefore, they have waived an objection to the absence of any request for retraction that they now claim should have been made. Moreover, the statutes only require a request for retraction in the case of written publications, not in the case of radio broadcasts. §895.05(2), Stats. Much of the slander in this case stems from the radio broadcasts of Mr. Sykes. Thus, no request for retraction was necessary.

III. ANIMAL LOBBY AND MS. SCHULTZ DO NOT TAKE CONTRARY POSITIONS ON THE REQUIREMENT IN WISCONSIN CASE LAW REGARDING THE BURDEN OF PROOF FOR ACTUAL MALICE AT THE SUMMARY JUDGMENT STAGE.

Respondents claim at page 38 that Animal Lobby and Ms. Schultz took contrary positions on whether Wisconsin law

requires a public figure plaintiff to prove actual malice, by clear and convincing evidence, at the summary judgment stage. Both plaintiffs recognize that case law in Wisconsin considers Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). However, both plaintiffs also agree with the position of Ms. Schultz's brief at 40-41 that in Torgerson v. Journal/Sentinel, Inc., 210 Wis.2d 525, 541-42 and n.16, 563 N.W.2d 472 (1997), the Wisconsin Supreme Court suggested that Anderson might never have been laying down this requirement for state cases but only for federal cases, because of the Federal Rules of Civil Procedure. Both plaintiffs in this case take the position that the law requires that standard summary judgment methodology be used when determining whether a reasonable jury could find actual malice by clear and convincing evidence and that the inference is in favor of the person against whom the summary judgment motion is sought. Both plaintiffs ask the court of appeals to consider this in deciding whether to reinstate the claims dismissed on summary judgment by Judge Foley when he ruled that actual malice could not be proved with clear and convincing evidence.

IV. APPELLANTS CONTEND THAT THEY CAN SHOW ACTUAL MALICE ON MOST OF THE 78 CLAIMS THAT WERE DISMISSED ON SUMMARY JUDGMENT PRIOR TO THE BENCH TRIAL.

Respondents say at p. 42 that neither Ms. Schultz nor Animal Lobby addressed how actual malice could be shown for the claims labeled as Groups #3 and #4 on p. 43 of Ms. Schultz's brief. Actual malice for group #3 defamations was not argued in either brief. However, actual malice for group #4 defamations was argued in Animal Lobby's brief at pp. 33-37, without being labeled as group #4 defamations. Animal Lobby's argument is sufficient for both appellants because both briefs indicated that they were incorporating arguments in the other brief by reference. [Schultz Br. at 49; Animal Lobby Br. at 42].

Respondents misrepresent the test for actual malice at pp. 38-41 of their brief. They discuss only one way of proving

actual malice, namely showing that the defendant knew the statement was false. However, there are alternative tests for actual malice, either of which is sufficient to prove actual malice. The other test, besides knowledge of falsity, is "reckless disregard for the truth." Gertz v. Welch, 418 U.S. 323, 349 (1974); Denny v. Mertz, 106 Wis.2d 636, 659, 318 N.W.2d 141 (1982). This test was discussed in Ms. Schultz's brief at p. 42.

Respondents also cite a number of cases at pp. 39-41 for their discussion of their truncated test for actual malice. Besides being limited to one part of the test, many of these do not stand for what respondents claim. Speer v. Ottaway Newspapers, Inc., 828 F.2d 475 (8th Cir. 1987), does not stand for the proposition that one is innocent of actual malice when he has good grounds for making a statement. In fact, Speer said at p. 478 that, while the failure to investigate does not automatically show bad faith, nevertheless, a good faith belief on the part of the writer that the offending statements were true cannot provide a shield from a finding of actual malice. The actual quote from Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657, 668 (1989), *citing* Herbert v. Lando, 441 U.S. 153, 160 (1979) and Tavoulareas v. Piro, 817 F.2d 762,789 (1987), is "a plaintiff is entitled to prove the defendants' state of mind through circumstantial evidence...and it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry." Thus, it is not as respondents claim at p. 40 that Harte-Hanks says that only knowing falsity can be proved through circumstantial evidence. Similarly, at p. 40 respondents misrepresent Tavoulareas, which also does not say that actual malice requires substantial evidence of knowing falsity. The actual and full quote says actual malice can be found from motive and ill will "when combined with other more substantial evidence of a defendants' bad faith." Tavoulareas, 817 F.2d at 795 (emphasis added).

Respondents use their one-sided actual malice test to soft pedal Mr. Sykes' slanders falsely accusing Ms. Schultz of waging a year long "campaign of harassment" against a family in Whitefish Bay by saying at p. 43 that "[a]t worst, he

erroneously concluded from ambiguous facts." However, the respondents do not explain what those ambiguous facts are. This, also, does not explain the venom with which Mr. Sykes attacked Ms. Schultz and the Animal Lobby. That venom is one of the pieces of circumstantial evidence that shows "reckless disregard for the truth."

An especially obvious example of respondents' whitewash is their statement at p. 46 that Sykes was telling the truth when he said Ms. Schultz lied about the Fine campaign finance report. The way they "prove" she "lied" is: (1) she told the Journal Sentinel reporter that she was "pretty positive" the report had been mailed by the campaign treasurer; (2) it had not been mailed; (3) the treasurer acknowledged it was his responsibility to mail it and that he had not done so. Thus, respondents argue that Schultz was lying when she said she was "pretty positive" it had been mailed, and so Mr. Sykes did not defame her when he called her a liar on the radio. When one checks respondents' cites for this and goes to their Appendix at D.649, both Schultz's statements and the treasurer's statements are in the Journal Sentinel story on which Sykes allegedly relied. There is no way that story supports calling Ms. Schultz a liar. In fact, Ms. Schultz didn't lie according to the testimony of the campaign treasurer who filed the report [94:Behrend depo. pg. 14-16, 25, 37-39, 45-47]. Additionally, the tape of this broadcast was one of those destroyed after the respondents were put on notice of a lawsuit and to not destroy the tapes giving more weight to a finding of actual malice on this claim.

Respondents also misrepresent Humane Society Officer McDowell's reports on the conditions of the dogs at p.43 of their brief. The reports speak for themselves [A:AP:311-316]. Additionally, the police reports, that Ms. Rohde had, corroborated the humane society report that stated that the owners of the dognapped dogs had violated Wisconsin law by failing to provide food and shelter to their dogs. Quite the opposite of the "authorities found no mistreatment" headline in the Journal Sentinel that was repeated throughout their articles even after they received notice that the statement was

not true [A-AP:310].

Respondents defend themselves on the destruction of the broadcast tapes that Ms. Schultz first requested and then asked be preserved in anticipation of this law suit. They say it was "destruction of material not relevant to the challenged libel." Not so. Journal reporter, Dennis McCann, testified that he was on a Sykes program when Sykes again was discussing the killing and carving up of the dog the challenged defamations in this case [27:130]. That tape was also one of the tapes that was destroyed and the spoilation of this evidence suggests that the tapes were relevant. That is undoubtedly why the supreme court in Torgerson, 210 Wis.2d at 549, said that the destruction of evidence could be sufficient to support a verdict of actual malice.

Respondents say several times in their brief, e.g. pp. 42 & 48, that the alleged libels are not actionable because they were "grounded in truth." Truth is the ultimate defense in libel and slander. The statements must actually be true, and not "grounded" in truth, for the defendants to escape liability. Respondents' incredible interpretation goes like this: because it is true that Ms. Schultz was charged with being a party to a dognapping, then anything the Journal Sentinel or Mr. Sykes said about her was "grounded in truth" - whether it concerned a campaign finance report or a "campaign of harassment" or having a dog killed and carved up to prove a political point and get publicity.

V. APPELLANTS TIMELY REQUESTED A JURY TRIAL

Respondents say at p. 30 that appellants waived any right to a jury they may have had. Respondents cite § 805.01, Stats. First of all, appellant timely requested and paid for a jury trial for this case under § 805.01, Stats. [B:AP:970] and participating in a court ordered "evidentiary hearing" does not waive a plaintiff's right to have the facts decided by a jury. Additionally, since the bench trial in this case was billed as a preliminary "evidentiary hearing" and the judge never told anyone what standards he was using to conduct the

unprecedented hearing, the appellant had no reason to believe that the court would take the inconceivable and unparalleled step of deciding issues of fact based on whom he believed when a jury trial was paid for and requested. Furthermore, appellants filed a timely objection to the "evidentiary hearing"[R.101].

Respondents say at p. 30 that "not until closing argument, a week after the evidentiary record closed, did appellants' counsel demand a jury." However, that was the first that counsel knew that what had occurred was not simply an evidentiary hearing but a trial on dognapping and/or attempted subornation of perjury. It was only when counsel came before the judge for closing argument (January 21) that it became obvious the judge was going to dismiss the case based on whom he believed on two collateral and immaterial issues and make a fact-finding decision for which he had not even announced the burden of proof [A-AP:297-303].

VI. THERE WAS NO FRAUD ON THE COURT AND THE COURT WAS NOT A NEUTRAL AND DETACHED MAGISTRATE

Respondents say at p. 23: "Almost the whole Complaint bottomed in Ms Schultz's claim that she had nothing to do with the dognapping. Because the truth is otherwise, then almost the whole Complaint was a fraud on the court." The complaint says what it says and that is that the claims in this case had nothing to do with the Journal and Sykes reporting that Ms. Schultz or the Animal Lobby, Inc. were accused of being parties to the dognapping. Thus, the complaint is not a "fraud on the court." Ms. Schultz's brief at p. 37 further discusses the standards for a finding of "fraud on the court" and, contrary to respondents smoke screens, a fraud on the court has not occurred anywhere within this case.

Respondents say at p. 29 of their brief that there is no basis to contend that Judge Wasielewski was less than a "neutral magistrate." There is not space in this brief to recount all of the instances where Judge Wasielewski acted as an

advocate for the respondents in this case. However, pages of transcripts have been assembled in volume III of the appendix at B:AP:1170 that the plaintiffs ask the court to review.

VII. THE COURT SHOULD NOT PERMIT A PRIVILEGED PUBLICATION THAT IS IMMUNE FROM A LIBEL SUIT TO BE USED BY LIBEL DEFENDANTS TO ATTACK A LIBEL PLAINTIFF'S REPUTATION.

Respondents state in their brief at pp. 23-24 that, if the two claims that survived summary judgment had gone to trial, respondents would have used the dismissed claims to attack Ms. Schultz's reputation in an effort to defeat her two remaining claims. They give this as the reason why dognapping was material to the two remaining claims, and they cite the trial court's statement that this was why dognapping was material. First, none of the claims in this case were "grounded" in anyone's guilt or innocense in the dognapping and all of the claims in this case would have been brought even if Ms. Schultz would have been convicted of the dognapping. Secondly, if the respondents really believe that their strategy would have worked, Mr. Engel would have been a welcome witness for them. Mr. Huston, however, testified that, in spite of Mr. Engel's "credible" claims, the respondents had not planned to call Mr. Engel as their witness if the case would have went to a jury [211:44]. Furthermore, respondents should be ashamed to make this argument which so perverts privilege. The "privilege" to which respondents refer is the First Amendment privilege that prevents damaged individuals from suing the perpetrators for liable if they cannot show actual malice. For the respondents to turn privilege on its head, by using their own false and defamatory statements to say plaintiff's reputation was already damaged, is to pervert privilege. In fact, the court of appeals should use this case as the opportunity to rule that libel defendants may <u>not</u> attack a libel plaintiff's reputation with the defendants' own false and defamatory reporting that has been shielded from a libel suit by privilege. In other words, if the court of appeals allows the two claims that survived summary judgment to go forward to trial, but does not reinstate any of the false claims that were

dismissed for privilege, the court should prohibit defendants from using the untrue reports of Mr. Sykes or Ms. Rohde at trial to question the plaintiff in the following manner: "Isn't it a fact, plaintiff, that it was these statements by Mr. Sykes that you waged a "campaign of harassment against this family" and that you were "convicted of a felony" that actually hurt your reputation, and not the Journal and Sykes' statement that you had a dog killed and carved up to prove a political point and to get publicity.

VIII. APPELLANTS WERE NOT PUBLIC FIGURES

The public figure issue has been sufficiently addressed in this appeal and more extensively briefed at [R:14] in the record. Because of the space limitations in this brief, appellants ask the court to review the record [R:14] where this very important issue has been substantially briefed.

CONCLUSION

For the foregoing reasons and the reasons set forth in the brief, the court of appeals should grant the relief requested in its brief.

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Pet 238

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CYNTHIA A. SCHULTZ and
ANIMAL LOBBY, INC.,

Plaintiffs-Appellants-Cross Respondents

v.

Appeal No. 00-0915

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP,
and JOURNAL SENTINEL, INC.,

Defendants-Respondents-Cross Appellants

BRIEF OF APPELLANT SCHULTZ

ON APPEAL FROM AN ORDER AND JUDGMENT OF
THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. FRANCIS T. WASIELEWSKI, PRESIDING
CIRCUIT COURT CASE NO. 98-CV-000724

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STATEMENT OF THE CASE

A. PROCEDURAL STATUS

This is a defamation case. The January 28, 1998 complaint contained 80 instances of libel and slander [R.2][15], which occurred in multiple radio broadcasts by Charles Sykes [A-AP:203-281] and in multiple Journal Sentinel articles [A-AP:282-296].

Defendants filed motions to declare plaintiff a public figure [6] and for summary judgment [7]. The court found that plaintiff is a limited purpose public figure [A-AP:193-202]. The court also granted the defendants' summary judgment motion as to 78 counts of defamation [A-AP:168-92]. The court allowed 2 counts of defamation to go forward concluding that the plaintiff could prove actual malice on those two counts [A-AP:166-67&168-92]. Defendants filed a petition for leave to appeal a non-final judgment. The court of appeals denied the petition.

Judge Francis Wasielewski rotated onto the case in June 1999 [74]. Defendants filed a second summary judgment motion in August [85]. In September, defendants alleged that the plaintiff had committed perjury and subornation of perjury and moved the court to dismiss the case, or, in the alternative, to hold an evidentiary hearing [98]. The plaintiff, in her response brief, denied the accusation and objected to the hearing and to the dismissal of the case [101]. The court denied the summary judgment motion on December 20, 1999, finding

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[15] Future references to the record will be in brackets but the R. will be deleted. References will first give the record number, followed by a colon then the page number, e.g. 45:16. When a record item is in the appendix, the reference in brackets will be to the appendix and its page, e.g. A-AP:101.

again that actual malice could be proved on the two remaining claims [A-AP:156-62].

On January 10, 2000, the court began a four-day "evidentiary hearing" [197;198;200;202]. The hearing, in fact, turned into what even the court and defendants recognized was a bench trial on subornation of perjury. [202:191; 204:55,86; 208:31,59; 210:7,8,37,69; 211:12,13,71; 21:112]. On January 21, the court found the plaintiff guilty of attempting to suborn the perjury of Clary Engel and the court dismissed the case [A-AP:104-36].

On February 11, the court issued a temporary injunction preventing plaintiff from spending any of her assets [206:17-38,167]. On February 15, the court denied plaintiff's motion for reconsideration, without comment [207:2]. On February 22, plaintiff filed a petition for leave to appeal a non-final order [159]. It was denied on February 28 [164; 208:2-3]. On February 29, the court had a hearing on whether the lawsuit was frivolous and on the award attorney fees [208]. The court concluded that the case was not frivolous [A-AP:139,144]. However, the court awarded defendants attorney fees and non-statutory costs of $155,797.31 [A-AP:101-03]. The court also said it was awarding fees and costs all the way through the appeals and "as long as this issue is alive, until there is a final judgment entered from which no appeal can be taken." [A-AP:154]. This language is not in the judgment [A-AP:101-03].

Plaintiff filed a petition for leave to appeal [00-503-LV]. The court of appeals denied it on March 15 [173]. Final judgment was entered on March 27 in the amount of $168,944.97, including statutory costs [A-AP:101-03].

Plaintiff appeals from the dismissal of the case and statutory costs, the award of fees and non-statutory costs, the first summary judgment dismissing 78 instances of libel, the

order that plaintiff is a limited purpose public figure, and, if it is binding, the court's oral *dicta* that fees would continue through all appeals.

B. STATEMENT OF FACTS

It is first necessary to understand two background incidents in order to understand this case, even though this case is not about these incidents. This case is about the defamations that connect plaintiff to these incidents.

The first background incident happened in 1993 in Calumet County. Irv Stebane was a dog dealer who was licensed by the USDA to collect and sell dogs to research facilities. Animal rights activists in the area claimed that Stebane was butchering dogs and selling them for meat. Activists from California sent a couple to the Stebane property to purchase dog meat. They videotaped Stebane killing and butchering a dog. Stebane was criminally charged with cruelty to animals, but the charges were dismissed. The California group was criticized for having a dog killed [7:205].

The second incident happened in 1996 in Whitefish Bay. For months, neighbors of a couple had complained to authorities about the couple's neglect of their two dogs who lived outside [7:82,89]. The dogs were subsequently taken from the owners' back yard in January 1996, after complaints to authorities went unsatisfied. About a month and a half after the dogs were taken, the first of many newspaper stories on the missing dogs ran on the front page of the Sunday, March 3, Journal Sentinel [A-AP:282]. A Waukesha dog breeder recognized the story to be about dogs she had received from another dog breeder in Illinois, who received the dogs from a Madison dog breeder [131:Ex.13, 29,79-81]. The Madison breeder notified police, and the dogs returned to the owners [131:Ex.13,84-86].

Plaintiff Schultz is an animal rights activist. When the Journal Sentinel and Sykes were reporting on the dognapping, they also reported that Ms. Schultz "had a dog killed and carved up to get publicity and to prove a political point." [A-AP:270]. Ms. Schultz did not set up the Stebane sting and was never involved in having a dog killed and carved up for any reason. These statements form the causes of action that survived two summary judgment motions in this libel case.

Regarding the Whitefish Bay dognapping, police began investigating in earnest on February 16, two days after Marie Rohde, a reporter for the Journal Sentinel, went to the police department to inquire about the case [A-AP:317]. Ms. Rohde claims to have found out about the story from another reporter, although she did not remember who its was [27:4-5,11]. Between February 16 and until charges were filed in May, defendants did numerous radio and newspaper stories and made regular calls to the police department, to the Milwaukee County District Attorney, and to the special prosecutor who was appointed to the misdemeanor case in early May of 1996 [131:Ex.13, 98-99;27:11,54-55]. On May 21, 1996, Ms. Schultz was charged with being a party to the misdemeanor of dognapping, pursuant to §§ 951.03 & 951.18, Stats.[7:129,130-31] The criminal complaint that was faxed to the Journal Sentinel and to Charlie Sykes on the day that charges were filed [131:Ex.13,98-99;27:53], was read in its entirety on WTMJ radio [A-AP:293][16], and the Journal Sentinel did another front page story on the charges [A-AP:287]. WTMJ radio and the Journal Sentinel, both owned by Journal Communications, were the only media in Milwaukee that publicized the dognapping. In December 1997, the charges were dismissed without trial [A-AP:318-19]. Neither the Journal Sentinel nor Charlie Sykes publicized the dismissal.

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[16]This tape was destroyed after plaintiff informed the defendants that she was contemplating this libel action.

Ms. Schultz became a subject of the misdemeanor investigation after she called the dogs' owners to ask that they bring the dogs inside after receiving complaints, on the WSPCA line, about two abused dogs who were outside shivering and freezing. She got an answering machine and did not leave a message. The owner claimed that he used the call-back feature to determine who had called and got Ms. Schultz's number[7:91].

Ms. Schultz did not steal the dogs and was never charged with stealing the dogs or of being party to stealing the dogs. She was charged with the misdemeanor crime of being party to a dognapping because of her alleged involvement with the dogs after they were taken [7:129-31].[17]

The Journal Sentinel published numerous articles concerning the incident [A-AP:282-296]. Charlie Sykes of WTMJ, radio made an assortment of false accusations about Ms. Schultz on at least 12 shows from March 4, 1996 through July 1996 [A-AP:203-281]. The defamations contained in those radio broadcasts and newspaper articles falsely accused Ms. Schultz of committing a felony, leading a year-long campaign of harassment against the owners of the dogs, and of making a "hang-up call" to the owners of the dogs [Id]. Sykes and the Journal Sentinel also reported falsely on the living and physical conditions of the dogs to undermine Ms. Schultz's credibility for taking the position that it was justifiable for someone to take dogs away from owners who were neglecting and abusing them [Id.]. Sykes and the Journal Sentinel also falsely accused Ms. Schultz of impersonating Humane Society workers to "hoodwink" people, and Sykes falsely accused Ms. Schultz of lying about the late filing of a Fine For Supreme Court finance report [Id.].

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[17]It should be noted that dognapping is not the theft of dogs but the moving or hiding of dogs.

On March 26, 1996, Ms. Schultz notified WTMJ radio that she intended to file an action for defamation and requested they preserve the tapes and provide her with a copy [A-AP:325-26]. WTMJ provided her with some of the tapes but refused others. [A-AP:327]. On April 19, 1996, Ms. Schultz filed a complaint with the FCC [A-AP:328-29]. Ms. Schultz subpoenaed the Sykes tapes for her criminal case and was told that the tapes that she had requested had been destroyed [109].

On March 3, 1996, Ms. Schultz sent Journal Sentinel a letter to the editor pointing out the inaccuracies in their March 3rd story [A-AP:320]. On March 22, she sent a letter to the editor requesting a retraction for statements made in their articles describing her as a "vigilante animal activist" who was suspected in the abduction of two dogs because she was concerned that they "might have been mistreated by being kept outdoors." [A-AP:321-22]. The Journal Sentinel ignored her requests and, on April 17, published another false story [A:AP:295]. On April 17, Ms. Schultz sent the Journal Sentinel a letter requesting a retraction for the falsities in that story [A-AP:323-24]. Again, her request was ignored. Before filing this defamation lawsuit, Ms. Schultz sent another formal statutory request for retraction[A-AP:332-37]. No retraction was printed.

The two counts of defamation concerning "killing and carving up a dog" survived summary judgment. Two different judges concluded that the plaintiff could prove actual malice on these [A-AP:156-192]. However, summary judgment was granted on the other 78 claims, because the trial court concluded that the plaintiff could not prove actual malice [A-AP:168-92]. The facts concerning the dismissed libel claims will be discussed in section IV below.

The two surviving defamation claims never went to a jury because the trial court dismissed them after it held a bench trial to determine whether plaintiff Schultz was guilty of committing and suborning perjury in the Whitefish Bay

dognapping incident [A-AP:104-36]. The court held the bench trial on defendants' allegations, even though the defamatory statements surrounding the dognapping incident were no longer the subject of this lawsuit and even though none of the dismissed claims resulted from defendants' having reported that Ms. Schultz was suspected of and charged with being party to the dognapping [2].

Defendants' witness for the subornation of perjury allegations was Clary Engel [197:74-124; 198:27-141; 200:23-81]. Engel had been listed as a possible witness in the misdemeanor dognapping trial that never took place [216:Ex.45 Rowe 3-8]. Engel was considered a witness in that case after he spoke to Ms. Schultz's attorney and told the attorney that he was at Ms. Schultz's house and overheard the telephone calls that she received on the day the dogs were taken [Id.]. Mr. Engel was put on the list. However, he was not proffered as an alibi witness in the misdemeanor dognapping case that was dismissed [202:25;204:60].

Mr. Engel's name was also placed on a preliminary list of 48 possible witnesses in the instant civil defamation case because, in August 1998, he called Mr. Ehlinger, Ms. Schultz's attorney, and told him essentially what he had told Ms. Schultz's lawyer in the misdemeanor dognapping case[202:9]. On September 24, 1998, after reading an article in the Journal Sentinel reporting that Ms. Schultz's case was going to trial, Engel called Ms. Schultz to again ask if he would be a witness [A-AP:296; 216:Ex.101-02,05,06,07,08,10]. He claimed that he had heard the broadcast when Sykes linked her to the Stebane dog killing incident and he thought less of her because of this [202:126-29]. Mr. Engel was not the only witness scheduled to testify in this regard as the court pointed out [A-AP:142].

Defendants alleged that plaintiff asked Mr. Engel to lie both about being at her house on the day of the dognapping and about hearing the Sykes broadcast accusing her of killing

and butchering a dog [98]. These allegations became the subject of the bench trial in the instant case. The following is the testimony that came out at the bench trial.

Ms. Schultz testified that, in preparation for her criminal trial, she prepared a list of questions and answers for her attorney in the misdemeanor dognapping case [202:9]. She testified that she put down the answers that Mr. Engel gave her when she asked him the questions [202:123]. She gave this document to Mr. Engel and to her criminal attorney [202:121-22]. Her lawyers from the misdemeanor case testified at the bench trial and in court-ordered depositions in this defamation case that Ms. Schultz did the same thing for all her potential witnesses [202:9-18]. One of Ms. Schultz's attorneys, Lisa Rowe,[18] testified that she had spoken to Mr. Engel at the time and that what he told her was consistent with the notes that Ms. Schultz had given her [216:Ex.45,4-5]. Mr. Engel testified that he never spoke to Ms. Rowe [197:92]. Mr. Ehlinger, Ms. Schultz's attorney in the trial court, testified that Mr. Engel had called him and told him the same things that were in the notes that Ms. Schultz had given to her attorneys in the dognapping case [102:1-12]. Mr. Engel denied calling or having the conversation with Mr. Ehlinger [A-AP:539-41]. Mr. Engel's telephone records proved that he had called Mr. Ehlinger [216:Ex.101,02,05,06,07,08,10]. The court specifically said that it believed Mr. Ehlinger [204:78-79].

Ms. Schultz testified that Mr. Engel called her on August 23, 1999 after receiving a subpoena from the defendants to testify at a deposition [198:91-92]. She testified that Engel suggested (she thought kiddingly) that he should get something for his trouble of testifying at his upcoming

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[18] Lisa Rowe was the Assistant District Attorney in Sheboygan County at the time the court ordered her to give a deposition in this defamation case.

deposition. Mr. Engel's telephone records reflected the telephone call to Ms. Schultz [216:101-02,05,06,07,08,10]. Ms. Schultz testified that she did not agree to give Mr. Engel anything [202:126]. At the bench trial, it was revealed, through Mr. Engel's own testimony [A-AP:394] and telephone records [216:101,02,05,06,07,08,10], that he called Sykes and the Journal Sentinel and also asked them for money [A-AP:394]. Mr. Engel had lied in his deposition to conceal the fact that he called Sykes and the Journal Sentinel for money [A-AP:544]. Mr. Engel testified that neither Sykes nor the Journal Sentinel would pay him but that they were "interested" [A-AP:394-99].

At the time of the bench trial, Engel testified that, after he received a subpoena from the defendants to come to a deposition, he took his claims, that Ms. Schultz had asked him to perform various illegal activities and that she was paying off all of her witnesses, to the defendants' attorneys [130:Ex.8]. He testified that his fiance was the sister of U.S. Attorney Joseph Wall, so, after he had been denied money by Ms. Schultz and by the Journal and Sykes, he called Joe Wall and gave him a similar story that Ms. Schultz had asked him to lie [197:117]. Mr. Wall, instead of escorting Mr. Engel to the District Attorney, escorted him to the offices of Foley & Lardner to meet with the defendants' attorneys on the day before Mr. Engel's scheduled deposition [130:Ex.8;200:90]. (Mr. Wall testified at the bench trial that he did not know that Mr. Engel had tried to get money from the defendants [200:95-96].) Mr. Engel further testified that, at the meeting in the office of Foley & Lardner, defendants' lawyers asked him if he would get evidence of Ms. Schultz attempting to suborn his perjury by taping a telephone conversation with her, but he refused to do the taping because he did not want to be a "Linda Tripp" [198:122-29]. The deposition for the next day was postponed.

The day before Mr. Engel's new deposition date of September 3, Mr. Engel went to the offices of Foley & Lardner to be prepared by lawyers for the videotaped deposition of the

following day [210:55]. In December, Mr. Engel again participated in a three hour mock trial with three lawyers at Foley and Lardner to prepare him for the bench trial [212:33-35,39]. However, at the bench trial, Engel repeatedly denied being prepared for the deposition [198:113] and he concealed his attendance at the mock trial when he was asked how many times he was at Foley & Lardner.[19]

Mr. Engel testified that Ms. Schultz called him on the morning of his September 3 deposition to get him to meet her in her lawyer's parking lot [A-AP: 417]. Telephone records, however, proved that Mr. Engel called Ms. Schultz three times on the evening before his deposition, not reaching her, and again on the morning of his deposition [216:101-02,05,06,07,08,10]. There were no telephone calls from Ms. Schultz to Mr. Engel that would have prompted Mr. Engel's call to her [216:101-02,05,06,07,08,10].

Mr. Engel testified that he met Ms. Schultz in the parking lot where he claimed she gave him a script. He testified that he did not have evidence of the script because she took it away from him [A-AP:434]. Mr. Engel testified that he did not tell the lawyers at Foley & Lardner about the meeting or the alleged script prior to his deposition that day because he was "late for his deposition" and did not have the time [98:95-96]. Mr. Engel and Mr. Huston later admitted that he did have the time being that he was in Mr. Huston's office drinking coffee before the deposition[A-AP:431, 211:15].

Ms. Schultz contradicted Mr. Engel's testimony. She testified that Mr. Engel called her on the day of the deposition, as the phone records confirm, and asked her for $2,000 [212:116-117]. Ms. Schultz asked him to meet her at her

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[19] The facts about the mock trial did not come out until a later hearing on fees [210:93].

lawyer's office. Mr. Engel did meet her at her lawyer's office but refused to come upstairs and continued instead to ask for money. She testified that at the end of their brief meeting, Mr. Engel told Ms. Schultz that he was just upset over his inability to pay his electric bill and over financial problems [202:130].

After hearing this testimony, the trial court decided it believed Mr. Engel, even though he admitted he had tried to get money from the media defendants and even though he was a five-time convicted felon and convicted of over nine misdemeanors, lied about the number of convictions during his deposition and at the bench trial,[A-AP:345,356,537-538; 216: Ex: 103-04],lied about the number of aliases he used,[507; 216: Ex:103-04], repeatedly lied about the number and length of times he met with the lawyers at Foley & Lardner,[A-AP:413,491,498,499,], lied about the number of times he had to sign his perjurious affidavit to conceal the fact that he lied about Ms. Schultz calling him on the first even more perjurious affidavit. [A-AP:496,503-04] and lied in his deposition to conceal his calls to Sykes and the Journal for money [A-AP:544-45].

In its decision, the court found that Ms. Schultz was guilty of attempting to suborn Mr. Engel's perjury, and punished her by dismissing the remaining claims of defamation. [A-AP:104-136].

Immediately upon obtaining dismissal of this case, defendants filed a motion asking the court to find the case frivolous under § 814.025, Stats. [125]. They requested that all of their attorney fees of approximately $470,000.00 be paid by plaintiff [136]. The court denied defendants motion to find the lawsuit frivolous [A-AP:137-54]. However, the court awarded defendants a judgment in the amount of $168,944.97 for attorney fees, non-statutory costs and statutory costs [A-AP:101-103].

ARGUMENT

I. STANDARD OF REVIEW

Did the trial court act without legal authority and violate plaintiff's constitutional rights when it held a bench trial to determine the credibility of witnesses prior to the scheduled jury trial, dismissed the case, and awarded attorneys fees to the defendants, even though the court found that the case was not frivolous under § 814.025, Stats.? Did the trial court fail to apply the proper standard of law to the facts when it granted summary judgment on 78 of the 80 original counts of defamation, and when it ruled that plaintiff is a limited purpose public figure? These are issues of law, which the court of appeals reviews *de novo*. First Nat. Leasing Corp. v. Madison, 81 Wis.2d 205, 208, 260 N.W.2d 250, 253 (1977).

II. THE BENCH TRIAL IN THIS CASE WAS CONDUCTED WITHOUT LEGAL AUTHORITY AND WAS UNCONSTITUTIONAL

After defendants lost one summary judgment motion [R.32;191] and filed a second [85], they filed a motion to dismiss [97;98], claiming that plaintiff Schultz committed perjury and attempted to suborn the perjury of a nonparty witness named Clary Engel. The court decided the second summary judgment motion in plaintiff's favor on December 20, 1999, less than a month before the January 10th jury trial [A-AP:156-65]. However, over the objections of the plaintiff [101:105], the court postponed the scheduled jury trial [123], and, beginning on January 10, the court held a bench trial on the allegations in the motion to dismiss [197;198;200;202;203]. At the end of the bench trial, the court dismissed the case [A-AP:104-36], after finding that the plaintiff had attempted to suborn perjury. However, the court, at a later hearing, stated explicitly that it had not made a finding on perjury[212:113]. The defendants agreed that the court made no finding that plaintiff committed perjury [212:114].

The position of plaintiff Schultz, both at the bench trial and in this appeal, is that she never committed perjury or attempted to suborn the perjury[202:72]. However, this is not an appeal concerning the sufficiency of the evidence on the court's finding. The basis of this appeal is that the court had no legal authority to hold a bench trial to determine the credibility of witnesses on the perjury allegations, when the plaintiff had requested and paid for a jury trial, the jury trial was scheduled, the court itself had determined that there were legitimate issues for trial which could not be dismissed on summary judgment, and the perjury allegation was not relevant to the issues to be tried. Ms. Schultz also contends that the bench trial violated her constitutional rights.

The legal arguments will be discussed in subsections A and B below. However, if the court of appeals is not persuaded by these legal arguments, plaintiff requests the court of appeals to review the actual transcripts of the trial [197,198,200,202,203] for sufficiency of the evidence.[20]

The transcripts show that there was not sufficient evidence to sustain the court's findings and its dismissal of the case. The transcripts show that there was one witness who claimed that Ms. Schultz, after barely knowing him for two months, had asked him to break into a veterinary clinic to videotape it [A-AP:415], asked him to steal two dogs in Whitefish Bay [A-AP:415-16], asked him to commit perjury,[A-AP:392] and told him that she was paying off all of her witnesses in this case [A-AP:376]. That was Clary Engel. Clary Engel was a convicted felon who, only after being confronted with telephone records, admitted that he tried to get money from the media defendants in this case before he went to their lawyers his allegations about Ms. Schultz.

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[20] Record numbers 199, 201, and 204 are eliminated because they are excerpts from transcripts with other numbers.

The sufficiency of the evidence argument is developed in the brief of the other appellant, Animal Lobby, Inc. That argument is incorporated into this brief by reference.

A. There Was No Legal Authority for the Court to Hold a Bench Trial to Determine Witness Credibility and Then to Dismiss This Case, When the Plaintiff Had Timely Requested and Paid for a Jury Trial and the Court Had Twice Denied Defendants' Motions for Summary Judgment.

The court concluded that § 901.04(3)(d), Stats., gave the court the right to hold the bench trial on the perjury allegations and to dismiss the case [203:67]. However, § 901.04 is titled "preliminary questions," and in subsection (3)(d), it authorizes a court to hold a "hearing out of the presence of a jury" on "preliminary matters." Thus, by its clear and unambiguous language, the statute contemplates an eventual jury trial, with any hearing being only "preliminary" to that trial. This statute does not authorize a court to substitute itself for the jury as the finder of fact on the credibility of witnesses. It does not authorize the court to hold a bench trial, prior to the jury trial, and then to dismiss a case based solely on the court's findings on witness credibility. The court itself referred to the hearings between January 10 and 21 as a "trial" [210:37,208:59,204:58,86]. Plaintiff does not dispute that § 901.04, Stats., authorized the court to hold an evidentiary hearing prior to the jury trial to determine what evidence could come into the jury trial. Following an evidentiary hearing, the court could have prohibited plaintiff from calling Engel as a witness in the jury trial.[21] Or, the court could have allowed defendants to put Mr. Engel and his claims in front of a jury. However, § 901.04 does

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[21] Plaintiff notes that her motions in limine [106,107, 108] were filed after defendants filed their motion to dismiss [97,98], which contained defendants' allegations regarding subornation of perjury. Yet, plaintiffs' motions in limine did not seek to exclude Clary Engel as a witness or to exclude any of the perjury allegations defendants had made about her.

not authorize the court to become the judge of the credibility of the evidence and then cancel the jury trial. If § 901.04 provides authorization for a court to take away the right to a jury trial, the statute is unconstitutional.

No other statutory authority was cited by the court or the defendants for the bench trial. In fact, other sections of the statutes show that the court has very limited authority to dismiss a case prior to a jury trial.

Section 802.06(2)(a)6, Stats., permits a court to dismiss a case only if plaintiff has failed to state a claim on which relief can be granted. A judge cannot make any credibility determinations in deciding it. In fact, defendants cannot file evidence outside the pleadings or else the motion to dismiss becomes a summary judgment motion, §802.06(2)(b), Stats. A court can also dismiss a case prior to trial if it finds that summary judgment is required by law, § 802.08, Stats. The rules for summary judgment preclude the court from weighing the evidence to determine credibility, § 802.08(2). If there is a dispute of material fact, there must be a trial. Id. A court may also dismiss a case as a sanction, for failure to make discovery, § 804.12, Stats., or for failure to prosecute a case, or to comply with procedural statutes, or to obey a court order, § 805.03, Stats.

None of these statutory bases, allowing dismissal of a case prior to trial, existed in this case. The threshold for challenging the sufficiency of the claim had been crossed two years before the dismissal. The court had twice refused to dismiss the case on summary judgment. Moreover, in its dismissal decision, the court acknowledged that summary judgment methodology did not permit the court to determine credibility [A-AP:105-06]. Finally, this case did not involve failure to make discovery, to prosecute, to comply with procedural statutes, or to obey court orders. There was no statutory authority for the court to dismiss the case or to hold

a bench trial.

Besides relying on § 901.04(3)(d), Stats., as authority for its bench trial and dismissal, the court relied on the following case law [203:90-95]: Johnson v. Allis Chalmers, 162 Wis.2d 261, 470 N.W.2d 859 (1991); Chambers v. NASCO, Inc., 501 U.S. 32, 42-43 (1991); Chevron Chemical v. Deloitte & Touche, 176 Wis.2d 935, 501 N.W.2d 15 (1993); and Garfoot v. Firemen's Fund Insurance, 228 Wis.2d 707, 599 N.W.2d 411 (Ct. App. 1999). However, none of these authorizes a court to hold a bench trial on credibility prior to a scheduled jury trial.

Johnson v. Allis Chalmers concerned dismissal of a case for failure of the plaintiffs to comply with the court's scheduling and discovery orders repeatedly over a period of five years. Johnson, 162 Wis.2d at 267. Such a dismissal is authorized by §§ 804.12 and 805.03, Stats., as explained above. It does not involve a determination of credibility by the court.

The trial court also cited Chambers v. NASCO, 301 U.S. 32, but only to the extent of using two quotes in Chambers from other cases for the proposition that courts have inherent authority to impose sanctions.[22] The court did not look to Chambers for more than those quotes. Nor does Chambers support the court's dismissal in the instant case when the case is examined for more than the quotes. First, the sanction imposed in Chambers came after a trial and did not require the court to make credibility determinations. Chambers had disobeyed court orders and a finding of frivolousness

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[22] The first quote, Chambers, 301 U.S. at 42, was from the lower court's opinion in the Chambers case, namely NASCO, Inc. v. Calcasieu Television & Radio, Inc., 894 F.2d 696, 702 (5th Cir. 1990). (Note, in its decision at R. 203:90, the court in the instant case gave the cite for this 5th circuit opinion as 894 Wis 2d instead of 894 F.2d). The second quote Chambers, 301 U.S. at 43, was from United States v. Hudson, 7 Cranch 32, 34 (1812).

preceded the imposition of sanctions in Chambers. In contrast, the court in the instant case found that this case was not frivolous [A-AP:139,144]. Moreover, the sanction in Chambers was for the plaintiff's bad faith. In the instant case, a finding of bad faith is impossible since the case was not frivolous. See § 814.025, Stats. Finally, Chambers concerned the authority of federal courts. It did not lay down rules defining inherent authority for state courts. Thus, Chambers does not stand for the proposition that the court in the instant case had "inherent authority" to overrule both state statutes and the plaintiff's right to a jury trial, and for the court to become the trier of fact and dismiss the case based on the court's credibility determination regarding the immaterial testimony of one person who was never proffered to the court as a witness.

The trial court also relied on Chevron Chemical, 176 Wis.2d at 935. Chevron also does not stand for the principle that a trial court can make credibility determinations and then dismiss a case prior to trial as a sanction. In Chevron, the Wisconsin Supreme Court affirmed § 805.03, Stats., which allows sanctions for failure to obey court orders. The defendant in Chevron had persistently disobeyed court orders, and the dismissal came after a jury trial, not before it. In Chevron, the judge entered judgment notwithstanding the verdict, which is authorized by statute, § 805.14(5)(b). Moreover, according to the judge, this was not entered as a sanction but was "based on the record...and the evidence presented." Chevron, 176 Wis.2d at 953. Thus, her action did not take away the right to a jury trial and was authorized by statute.

The trial court in the instant case lastly relied on Garfoot, 228 Wis.2d 707. Garfoot also did not require the court to make a credibility determination prior to trial. Garfoot

involved the spoliation or destruction of evidence.[23] The fact that evidence had been spoiled was an admitted fact. Moreover, the court dismissed the claims involving the spoiled evidence because the court relied on its erroneous interpretation of case law as requiring a sanction for negligent destruction of evidence. Garfoot, 228 Wis.2d at 714. The court of appeals concluded that the trial court had misinterpreted the case. The case was remanded to the trial court to, among other things, determine what impact the destruction had on the defendant's ability to defend the case. In summary, the statutes and case law the court used for its dismissal does not support the bench trial or the decision.

Defendants' motion to dismiss [99] presented other case law that the court did not cite in its dismissal decision and that also does not support the decision, as plaintiffs pointed out in their response brief [101]. Defendants, in their reply brief, however, didn't see much benefit to plaintiff's careful analysis of the case law and responded with an arrogant and unprofessional... "So what!"[103:2].

None of defendants' cases authorize the holding of a bench trial on credibility prior to a scheduled jury trial and then the dismissal of the case. Defendants' cases involve destruction of evidence, which is an objectively verifiable fact, or cases where a party or their attorney admitted they lied. Defendants' cases are:; Chemtall, Inc. v. Citi-Chem, Inc., 992 F. Supp. 1390, 1409 (S.D. GA. 1998); Combs v. Rockwell Int'l Corp., 927 F.2d 486 (9th Cir.), *cert. denied*, 502 U.S. 859 (1991); Jones v. Clinton, 36 F. Supp. 2d 1118, 1126 (E.D. Ark. 1999); Marrocco v. General Motors Corp., 966 F.2d 220 (7th Cir. 1992); Professional Seminar Consultants, Inc. v. Sino American Technology Exchange Council, Inc., 727 F.2d 1470 (9th Cir.

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[23]It should be noted that by conducting mock trials and by working with Mr. Engel's testimony rather than taking him to the District Attorney, defendants spoiled the evidence presented at the bench trial.

1984); Brady v. United States, 877 F. Supp. 444 (C.D. Ill. 1994) Rodriguez v. M&M/Mars, No. 96 C 1231, 1997 WL 349989 (N.D. Ill. June 23, 1997); Sun World, Inc. v. Lizarazu Olivarria, 144 F.R.D. 384 (E.D. Cal. 1992).

In Jones v. Clinton, the dismissal of the case was not based on any perjury allegations. The case was dismissed on summary judgment. Jones, 36 F. Supp. 2d at 1123. The contempt sanctions were for failure to obey the court's discovery orders. Id. at 1125-26. The court concluded that Clinton had confessed to the discovery violation on national television. Id. at 1123. Thus, there was no credibility determination.

In Chemtall, 992 F. Supp. 1390, the plaintiff had committed a "parade of horribles," Id. at 1406, and numerous discovery violations. More importantly, the defendant did not deny the perjury allegations. Id. at 1408. In the instant case, plaintiff Schultz denied them [101].Similarly, in Professional Seminar Consultants, where the case was dismissed because the defendant submitted false documents during discovery, the defendant did not deny that the documents were false, 727 F.2d at 1473. In Sun World, the dismissal came after numerous discovery abuses and after the defendant admitted that a crucial document he submitted in the case was fraudulent. 144 F.R.D. at 389-91. In Brady, the court dismissed the case because the defendant both destroyed material evidence and committed perjury. Mr. Brady admitted to back dating documents, destroyed others and then lied about the destruction in court when a plethora of witnesses had witnessed the destruction. Brady,877 F. Supp at 453. In contrast, in the instant case, the trial court based its conclusion that on the contradicted testimony of one witness, who was a multiple convicted felon [216; Ex: 103-04] and who shopped his testimony around to both the defendants and the plaintiff before testifying in the bench trial in this case [A-AP:394-407]. In Combs, plaintiff's counsel altered the plaintiff's deposition

testimony on material issues, 927 F.2d at 488. The plaintiff signed a statement that he had reviewed the transcript and had made the changes himself, although he never reviewed either the original or altered transcript. Id. The alterations were revealed in a second deposition. Id. In Rodriguez, an employment case, dismissal was because plaintiff denied in her deposition and on her employment application that she had ever been convicted of a crime. Defendants submitted documentary evidence to show that she had been convicted of four felonies, 1997 WL 349989 at 1-2. The court concluded that if it did not grant dismissal, there would be no evidence left to conduct a trial, and so the court would have to grant summary judgment to the defendants. Id. at 2.[24] In Marrocco, a products liability case, plaintiffs' experts inspected the automobile in spite of a Protective Order requiring both parties to be present at any inspection. The experts destroyed crucial evidence, 966 F.2d at 221. Plaintiff's attorneys requested the experts to testify that the evidence was destroyed at an earlier inspection when the defendants were present. Id. at 223. These facts were admitted.

Defendants produced no precedent for this dismissal. The trial court acknowledged that this was a case of first impression with no cases on point [A-AP:132]. Defendants and their expert likewise acknowledged that this case was novel and unique and that no Wisconsin court considered such a case in a reported decision [198:15; 210:12; 210:91].

To allow a trial court to conduct a bench trial, in lieu of a jury trial, to decide credibility issues would create a cottage industry of side car litigation. It would allow trial courts to

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[24] Appellant notes the irony that the Rodriguez case was dismissed when plaintiff lied about her felony record, but, in the instant case, the trial court found credible the testimony of a convicted felon who lied under oath about the number of times he was convicted [A-AP:343-57].

conduct grand jury investigations during the course of civil litigation in an attempt to "end run" jury trials and, as in this case, the criminal justice system.

B. *The Trial Court Violated Plaintiff's Constitutional Rights to a Jury Trial and to Due Process*

1. The bench trial violated plaintiff's constitutional right to a jury trial

The Wisconsin Constitution, art. I, §5, guarantees that "[t]he right of trial by jury shall remain inviolate...." Similarly, § 805.01(1), Wis. Stats., says that "[t]he right of trial by jury as declared in art. I, § 5, of the constitution or as given by a statute...shall be preserved to the parties inviolate." Additionally, art. I, § 3 of the Wisconsin Constitution provides a special guarantee of a constitutional right to a jury trial in defamation cases. It states that "the jury shall have the right to determine the law and the fact." The Wisconsin Court of Appeals recognized the importance of a citizen's right to a jury trial in Markweise v. Peck Foods Corporation, 205 Wis.2d 208, 224-28, 556 N.W.2d 326 (Ct. App. 1996). By conducting a bench trial on credibility of witnesses, the trial court violated the plaintiff's constitutional and statutory right to a jury trial and her constitutional right to have a jury determine all issues of fact in this defamation case.

Plaintiff never waived her right to a jury trial. After Plaintiff timely objected to the defendants' motion to dismiss [101], plaintiff was forced to participate in the "evidentiary hearing" that turned into a bench trial. Nonetheless, defendants had cited § 901.04(3)(d), Stats., as authority and the plaintiff had no warning that it would be a bench trial. As explained above, neither § 901.04(3)(d) nor any of the cases that defendants cited in their brief were authority for a judge to usurp the jury's roll in making credibility determinations. Moreover, right up until the day the court issued its decision,

the court indicated that there would be a jury trial in less than a month [198:52; 200:81; 202:187-88]. However, on January 21, the day of the court's decision, plaintiff's counsel asked to be informed on the burden of proof and whether the court would accord all inferences to the plaintiff, as is done for decisions on summary judgment [A-AP-301]. When the court said it was going to make a credibility determination, plaintiff's counsel demanded a jury trial saying that this was the first time the court indicated it was going to make a determination based on whom it believed [A-AP:301-03]. This exchange shows that the court took the unprecedented step of making credibility determinations in a case where the plaintiff had the full expectation that she was going to have the jury make those determinations. Plaintiff's primary right to a jury trial was violated by the court when it interposed a bench trial prior to the scheduled jury trial. Plaintiff's second right to a jury trial was violated when the court refused her counsel's request for a jury trial at the end of the "evidentiary hearing" when the court indicated that it would make a credibility determination [A-AP:101-03]. These two violations of plaintiff's constitutional right to a jury require the reversal of the court's decision.

In the case of Lanfear v. Blackman, 827 S.W.2d 87, 91 (Tex. App. - Corpus Christi 1992), the court said,

> "...a trial court may not effectively adjudicate the merits of a case based on testimony of a party during a sanctions hearing because he was later impeached on testimony given at that hearing. The witness' credibility should be tested when the case is tried. *Otherwise a trial court could at any time interrupt a trial proceeding if it believed a witness was being untruthful, and simply enter a default against the party procuring that witness for that reason*....A `death penalty' sanction is not proper punishment for what was perceived by the court to be perjured testimony. (Emphasis added)."

The Court in St. Mary's Honor Center v. Hicks, 509 U.S. 502, 520-22 (1993), said not all witnesses' lies justify sanctions.

The court in the instant libel case used the doctrine of inherent authority to conduct a bench trial and dismiss the case [A-AP:127-28]. In Jacobson v. A.P. Avestruz, 81 Wis.2d 240, 260 N.W.2d 267 (1977), the Wisconsin Supreme Court described two limitations on the inherent powers doctrine. One of those limitations was that, "the power must not abridge or negate those constitutional rights reserved to individuals." Id. at 247. Likewise, in Volland v. McGee, 236 Wis. 358, 294 N.W. 497, 500 (1940), the supreme court said, "The trial court may not do indirectly a thing which it has no power under the statute to do directly." A court in Wisconsin does not have inherent power to deprive a party of their constitutional right to a jury trial. The court may not indirectly become the judge of credibility through an "evidentiary hearing" when it may not directly judge credibility once a party requests a jury trial.

2. The bench trial violated plaintiff's constitutional rights to due process.

Besides violating plaintiff's right to a jury trial, the bench trial also violated plaintiff's constitutional rights to due process under the 5th and 14th amendments to the United States Constitution, and art. I, § 1 of the Wisconsin Constitution. For the trial court to become the trier of credibility violates due process. In Parham v. Kohler, 134 So.2d 274, 276 (Fla. Dist. Ct. App. 1961), the court held that plaintiffs in a personal injury case were entitled to have their case decided on the merits, although plaintiffs *admitted* that they had perjured themselves with respect to their marital status. "Even if the court had cited the appellants for contempt, they would still have a constitutional right to have their cause heard, and it would be a denial of due process to dismiss with prejudice." Id.

Besides violating due process by becoming the trier of credibility, the court, in the instant case, violated plaintiff's due process rights in other ways. It conducted a criminal bench trial within a civil case and concluded that the dismissal was punishment for finding the plaintiff guilty of that crime[206:8-9]. Second, the manner in which the trial was conducted violated plaintiff's due process rights because (1) the court ordered plaintiff's lawyers from prior cases to be deposed and informally interviewed by defendants' lawyers; (2) the court sealed the criminal records of Clary Engel and did not permit plaintiff's bad act evidence to be used to impeach his untruthful deposition testimony; (3) the court interrupted plaintiff's examination with negative and sarcastic comments while she was testifying at the bench trial. (4) the court forced the plaintiff to respond to defendant's questions that violated her attorney client privilege.

Furthermore, the court never indicated what burden of proof or standard it was using until the bench trial concluded. And almost all of the testimony, in the bench trial, was directed at proving that the plaintiff had committed the misdemeanor crime of dognapping that was dismissed in 1997. Although it was the same evidence the defendants had put forth in their prior summary judgment motions, plaintiff didn't know if she was being tried for dognapping or attempted subornation of perjury. At the beginning of the trial, plaintiff's counsel raised the objection that the court was "turning this hearing into a criminal trial" that had already been dismissed [197:25]. At the end of the trial, plaintiff's counsel inquired into what the burden of proof was and requested that the criminal burden of proof be used when it was clear that the judge was going to make a credibility determination and find guilt in a criminal matter [A-AP:298-99]. After the court consulted defendants' counsel on what should be the proper standard, the court stated that the civil burden of proof applied [A-AP:300-01].

Perjury itself is defined as a class D felony in § 946.31, Stats. Solicitation or conspiracy to commit a felony is a class D felony under §§ 939.30 and 939.31, Stats. An attempt to commit a felony is also a crime under § 939.32, but the penalty is one-half that for the completed crime. Thus, attempted subornation of perjury is attempt to commit a class D felony. Since the bench trial was actually a trial and not simply an "evidentiary hearing," the burden of proof should have been the criminal burden. It is a lack of due process for a court to apply the civil burden to a finding of criminal conduct and then to punish the plaintiff by depriving her of her right to recover damages, under art. 1 § 9 of the Wisconsin Constitution, for a meritorious civil defamation case. In this case, the court conducted a criminal trial by ambush, where the civil plaintiff became a criminal defendant without any of the protections of the criminal or civil justice system, and with none of the discovery or rules of evidence that a real civil or criminal trial offers. The court found her guilty and hung a perjury "badge of infamy" on her without due process. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

Lack of due process also occurred in this case by the manner in which the bench trial was conducted. First, the court invaded the attorney client privilege by ordering plaintiff's criminal attorneys from the dognapping misdemeanor case to be deposed and to testify [197:6-25; 198:6-14;44-55; 200:6-17; 202:5-26,175-187]. Yet, the court failed to put one of the attorneys under oath when he came into court to testify [200:11&5-23]. The court also ordered the court reporter, who transcribed a hearing in the misdemeanor dognapping case, to open the sealed transcript of the hearing thus ignoring the order of a court of equal jurisdiction [198:9-13]. Moreover, the ordering of plaintiff's former attorneys to testify in this civil defamation case was a gross violation of the attorney/client privilege and a violation of plaintiff's due process rights.

Additionally, the court violated due process by refusing to let plaintiffs use the information contained in Mr. Engel's criminal record to impeach Mr. Engel's false affidavit, deposition, and bench trial that was "pivotal" to the court's decision [212:5]. Further evidence, that the court was conducting a bench trial, is the manner in which the court excluded the evidence of Mr. Engel's criminal records from the "evidentiary hearing." The court had an "evidentiary hearing" within the main "evidentiary hearing" to determine whether to exclude the criminal records as evidence in the main "evidentiary hearing" that was really a bench trial. [A-AP:358-62]. Even further proof that the court thought it was conducting a bench trial was when, after Mr. Engel lied in his deposition and on the stand about the number of times he was convicted, the court instructed the defendants' to consult with Mr. Engel and have him correct his testimony. If the court had allowed the impeachment of this witness it would have found that Mr. Engel lied in this case about the number of aliases he used, the number of times he was convicted, that, in one of his criminal cases, he was involved a scam of payment for testimony [A-AP:305], that he was on probation when Ms. Schultz allegedly suborned his perjury but he did not report it to his probation officer[216:Ex.103-04], that his wife was brutally murdered (it remains unsolved) in the middle of a child custody dispute, after she had threatened to turn Engel into police for a burglary and after she had several times reported to police that she was afraid that he would kill her [216:Ex.103-04] and that Mr. Engel is a celebrated liar and con man [A-AP:304-09]. The court sealed and would not permit the information in Engel's criminal records to be used for impeachment [A-AP:362-64]. The United States Supreme Court held, in Green v. Bock Laundry Machine Company, 490 U.S. 504, 109 S. Ct. 1981, that a judge "must permit impeachment of civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony." In the instant case, the court's decision to prevent the plaintiff from

impeaching Mr. Engel's false testimony with prior bad act evidence is even more erroneous because the court, in the instant case, was supposed to be conducting an "evidentiary hearing" where evidence is not excluded.

Finally, the court violated due process by showing bias and prejudice against the plaintiff while she was testifying. Plaintiff's testimony started out under cross-examination as an adverse witness, an obvious violation of art 1 § 8 of the Wisconsin Constitution and the Fifth Amendment to the United States Constitution. At the bench trial, the plaintiff was asked a question about why some documents she was shown did not mention anything about a political campaign she was involved in [202:35-36]. She answered, "Why would they say that?" The court interposed, "You don't get to ask questions here. You only get to answer them." [202:36].

Later, the court commented on a difference between the answer plaintiff had just given to a question and the answer she had previously given to a similar question from the court. The plaintiff explained that the court had asked the question with the word "afterwards." The question she had just answered asked what happened *before* the event in question. After the plaintiff's explanation, the court commented, "Oh, what tangled webs we weave." The Court said that, if it was wrong that it would apologize to Ms. Schultz. The Court was wrong but did not apologize to Ms. Schultz [A-AP:548-557].

During plaintiff's direct testimony, the court kept her from giving her full response to questions by instructing her to limit herself to Yes and No answers, telling her she was supposed to pretend she was in the Army [202:79-80]. Yet, in its decision, the court said that it was assessing the plaintiff's credibility on the fact that she sometimes gave long answers and sometimes gave short answers [A-AP:118-19].

III. THE AWARD OF ATTORNEY'S FEES AND NON-STATUTORY COSTS TO THE DEFENDANTS WAS WITHOUT LEGAL AUTHORITY AND VIOLATED PLAINTIFF'S CONSTITUTIONAL RIGHTS.

At the close of the court's decision dismissing this case, the defendants filed a motion for attorneys' fees under § 814.025, Stats. [203:97-98]. After hearing arguments on the issues [206; 207; 208], the court ruled that the case was not frivolous [208:53]. The court also said that the finding of attempted subornation of perjury does not show that Ms. Schultz committed the dognapping [208:51]. Nevertheless, the court concluded that it could award attorney's fees as a sanction and that it would refer the case to the D.A. to take another look at the dognapping case[208:55-57]. The court award for attorney's fees and non-statutory costs was $155,700. Besides being treated below, the fee discussion in the Animal Lobby's brief is incorporated here by reference.

A. THERE WAS NO LEGAL AUTHORITY AND IT WAS A VIOLATION OF THE "AMERICAN RULE" FOR THE COURT TO AWARD ATTORNEYS' FEES AND NON-STATUTORY COSTS TO THE DEFENDANTS, SINCE THE COURT FOUND THAT THIS CASE WAS NOT FRIVOLOUS EITHER IN WHOLE OR IN PART.

Wisconsin adheres to the American Rule. Under this well-established Rule, litigants are responsible for their own attorney's fees, unless recovery is expressly allowed by either contract or statute. Wisconsin courts have strictly adhered to the American Rule. In City of Beloit v. Towns of Beloit, Turtle and Rock, in Rock Co., 47 Wis.2d 377, 392, 177 N.W.2d 377 (1970), the supreme court held that "the award of costs is wholly dependent on statutory provisions."

For its award of fees in the instant case, the court explicitly found that the case did not come under the one statute that permits an award of attorney's fees, namely

§814.025, Stats. [208:48,53]. Because the court ruled that the case was not frivolous, the court called its award of fees a "sanction." It relied on no statute to justify the sanction. Instead, it relied on the inherent power of the court and cited Schaefer v. Northern Assurance Co. of America, 182 Wis.2d 148, 161, 513 N.W.2d 615 (Ct. App. 1994). [208:57-58]. However, Schaefer is clearly distinguishable from the instant case. In Schaefer, the plaintiff admitted that he lied in his pleadings and depositions about who was driving the truck in which he was injured. Schaefer, 182 Wis.2d at 153. There was no bench trial on perjury and no finding of perjury or subornation of perjury in the face of plaintiff's denial, as in the instant case. Moreover, in Schaefer, the case was not dismissed when the plaintiff acknowledged his falsehood. In fact, the court denied defendants' summary judgment motion and allowed the case to proceed, at the same time it awarded attorney's fees for the additional expenses that the defendants had incurred due to the falsehoods in the pleadings. Id. The fee award was a condition of allowing the plaintiff to go forward by filing an amended complaint. Id. at 161. The case was later dismissed on summary judgment, but that dismissal was based on the lack of merit in the case that had dragged on for nine years. Id. at 154. Thus, Schaefer does not come close to giving the trial court authority to conduct a bench trial, when a jury trial was paid for and requested, to dismiss a meritorious case, and then to award a bankrupting $155,700.00 in fees and non-statutory costs.

Federal Courts recognize a bad faith exception to the American Rule. One of the standards for the bad faith exception is that the case is entirely without color. Courts have consistently declined to uphold awards under the exception, absent clear evidence that the challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes. "[T]he trial court must find clear evidence that (1) the offending party's claims were meritless and (2) the party acted for improper purposes." Agee

v. Paramount Communications, Inc., 114 F.3d 395, 398 (2d Cir. 1997). The test is conjunctive and neither meritlessness alone nor improper purposes will suffice. See Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir.1977). In the instant case, the court found just the opposite. The court found that the case had merit when the court dismissed the case. Thus, the trial court could not have found bad faith, as required by the inherent powers doctrine in federal courts.

Additionally, Wisconsin has §814.025(3)(a), Stats., a law that is has taken the position of the federal bad faith exception to the American Rule. Bad faith is defined in that statute as "an action"...commenced, used, or continued...solely for purposes of harassing or maliciously injuring another." Id. The court in the instant case made no finding that the plaintiff used this case to harass or maliciously injure the defendants. Moreover, the court could not have found bad faith in this case because the court found that it was not frivolous.[208:48,53]. For bad faith to be present, the case must be frivolous.

The trial court did state at the end of its decision [208:61] that "When the plaintiff...commits a fraud on this court and in so doing causes considerable financial costs to the party opposed...", it is fair to award attorney's fees. However, it is unclear whether this was simply *dicta* or whether the court found that the standards for "Fraud on the Court" had been met. The court gave no analysis and the facts of this case do not support such a finding. Fraud on the court is limited to "that species of fraud which does, or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases that are presented for adjudication." Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (1972). "The United States Supreme Court indicated, by way of contrast, that fraud upon the court does not exist where a judgment has simply been `obtained with the aid of a

witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury'." Serzysko at 702, *quoting* Hazel-Atlas Glass Co. v. Harford-Empire Co., 322 U.S. 238 (1944). In Lockwood v. Bowles, 46 F.R.D. 625 (D.D.C. 1969), the court said "perjury does not constitute fraud upon the court." Based on the standards for fraud on the court, it would be impossible for the court, in this case, to conclude that "fraud on the court" existed. No preliminary witness list was ever proffered to the court. Certainly, no final witness list had been submitted. The court could not have possibly concluded that "fraud on the court" exists where there may be an alleged possible attempt to get a peripheral person to lie at a deposition on an immaterial matter.

In the instant case, there was no basis in statute or case law for the trial court to award attorneys' fees and non-statutory costs to the defendants since it found that the case was not frivolous and, in fact, had merit. Moreover, the "inherent authority" of the court is not a catch all that permits a court to end run the specifications the legislature has laid out in the statutes. As is evidenced by this case, exploitation of the inherent powers doctrine can lead to disastrous results. Most importantly, however, is that it erodes confidence in the judicial system because it conveys the message that a litigant is at the mercy of individual judges rather than being subject to the rule of law.

B. The Award of Attorney's Fees and Non-Statutory Costs Violates Plaintiff's Constitutional Rights; the Defendants Did Not Have Clean Hands and There was no Consideration of the Ability to Pay.

The Fifth Amendment of the United States Constitution prohibits a "taking" of a person's property without due process. As argued above, there was no due process in this case prior to the award of attorney's fees. Attempted subornation of perjury is a crime. When you are accused of a crime, you have

a right to a jury trial, the criminal burden of proof, and notice of the penalty. In Wisconsin, the penalty for perjury is a $10,000 fine. §§ 946.31 and 939.50(3)(d), Stats. For a court to impose fifteen times that figure as a penalty in a civil case is a "taking" without due process [See 206:7].

There was no jury trial for the perjury decision. Likewise, there was no jury trial on the fee issue, even though plaintiff asked for a jury trial on fees in her second brief opposing the fees [155:4] and in the fee hearing before the court [206:24]. Thus, the award of fees also violated plaintiff's Wisconsin constitutional right to a jury trial.

Moreover, the award of fees was a double sanction for the court's finding of attempted subornation of perjury [206:10]. The court had already sanctioned Ms. Schultz by dismissing her defamation case that the court found had merit even with Mr. Engel's outrageous testimony.

Other than Mr. Engel's testimony, there was not one shred of evidence to back up his claims of subornation of perjury on the two defamation claims that were due to be tried in this case. The remaining claim against the Journal Sentinel was not even mentioned during the bench trial. Furthermore, the other claims, that were already dismissed on summary judgment, also could not have been defeated by the court's finding of attempted subornation of perjury. The award of fees, in this case, rewarded tortfeasors for building up their fees while creating a scenario on extraneous issues that allowed them to escape liability and a jury trial on legitimate claims.

The trial court said that the perjury findings were relevant to the two remaining claims to be tried, because defendants planned to use their reporting on the dismissed counts to defend against their false reporting in the remaining claims [A-AP:151]. In other words, defendants were planning

to argue to the jury that they had already so ruined Ms. Schultz's reputation with all the other false things they had said about her that she could not prove damage to her reputation from their false reports that she had a dog killed and carved up to get some publicity and to prove a political point. Additionally, the defendants, in this case, are tortfeasors with unclean hands[208:17-19]. They are not victims. They spent a lot of money on a diversionary tactic to keep meritorious claims away from a jury [210:8] who could well have concluded that the defamations were made with actual malice. Defendants asked the court for "equitable" relief. The court granted it. However, defendants did not have clean hands and thus had no standing to ask the court to act in equity to award them attorneys' fees.

The court refused to consider the relative wealth of the parties [212:76-83]. The fee that was awarded is one that can bankrupt an individual whereas the attorneys fees, in this case, were a tax deduction for the defendants. Additionally, the fee award in this case was purely punitive. It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages.

IV. THE COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT ON ALL BUT TWO OF PLAINTIFF'S EIGHTY LIBEL CLAIMS BECAUSE THE COURT SHOULD HAVE LET THE JURY DECIDE THE QUESTION OF ACTUAL MALICE AND PLAINTIFF CAN SHOW ACTUAL MALICE ON MOST OF THE DISMISSED CLAIMS.

Plaintiff asks the court of appeals to reinstate the 78 claims dismissed on summary judgment because the case of Torgerson v. Journal/Sentinel, Inc., 210 Wis.2d 525, 541-42 and n16, 563 N.W.2d 472 (1997) suggests that a court should not weigh the evidence to make a decision about actual malice at the summary judgment stage. Torgerson considered whether

the heightened evidentiary burden of proof for a finding of actual malice, namely clear and convincing evidence, must be considered by a court in a summary judgment decision on actual malice. It has been assumed that Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), mandated application of the heightened evidentiary burden in summary judgment decisions on actual malice. Id. at 257. However, the court's opinion actually involved the interpretation of Rule 56 of the Federal Rules of Civil Procedure. Thus, some commentators and the Wisconsin Supreme Court have pointed out that Anderson may have been laying down only a federal procedural rule rather than a First Amendment constitutional requirement. Torgerson, 210 Wis.2d at 541-42 and n.16.

If a trial court must apply the heightened evidentiary burden in a summary judgment decision on actual malice, then this would seem to violate the standards for summary judgment which require a court not to weigh the evidence in making a summary judgment decision. The United States Supreme Court recognized that the actual malice issue "does not readily lend itself to summary disposition." Hutchinson v. Proxmire, 443 U.S. 111, 120 n.9 (1979). Similarly, the Wisconsin Supreme Court held, "Because the actual malice inquiry...turns on the defendant's state of mind, it is thought particularly difficult to resolve without a full weighing of the competing evidence." Torgerson, 210 Wis.2d at 540. Thus, the 78 dismissed libel claims in this case should not have been dismissed but should have been given to a jury to decide the actual malice question.

Even if the court of appeals decides that the trial court is required to weigh the evidence on actual malice at the summary judgment stage, most of the 78 claims in this case should not have been dismissed because the plaintiff can prove actual malice. The standard for actual malice is defendants' "knowledge of falsity or reckless disregard for the truth." Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); Denny v. Mertz, 106

Wis.2d 636, 318 N.W.2d 141 (1982). Although actual malice in a libel case is different from the ordinary sense of the term "malice," which deals with spite, ill will, or motive, such evidence can be relevant to support a finding of actual malice.' Harte-Hanks Communication v. Connaughton, 491 U.S. 657, 667-68 (1989). This is because "a plaintiff is entitled to prove the defendant's state of mind through circumstantial evidence." Id. at 668; See Herbert v. Lando, 441 U.S. 153, 160 (1979). Moreover, the Supreme Court has held that "the meaning of terms such as `actual malice' -- and more particularly, `reckless disregard' -- is not readily captured in `one infallible definition'." Harte-Hanks, 491 U.S. at 686. The Court also called these terms "elusive constitutional standards" and added that the courts could "give content" to the meaning of these terms "only through the course of case-by-case adjudication." Id. Significantly, in Harte-Hanks, the court decided that the adjudication of the case showed actual malice, even though the plaintiff was a public figure.

Most of the 78 dismissed causes of action related to the Whitefish Bay dognapping, but none of them hinged on Ms. Schultz's guilt or innocence of the dognapping.

1. Nine claims were brought because Charlie Sykes's falsely accused Ms. Schultz of condoning and committing a felony. (This defamed, even if Ms. Schultz had been convicted in the criminal case, because dognapping is a misdemeanor).

2. Thirty claims were brought because the Journal Sentinel and Charlie Sykes falsely stated that Ms. Schultz led a year long "campaign of harassment" against a family for keeping their dogs outside.

3. Twelve claims were brought because Charlie Sykes had falsely accused Ms. Schultz of theft, vandalism, misrepresenting herself as a humane society worker, and leading a conspiracy.

4. Thirteen of the claims were brought because Mr. Sykes accused Ms. Schultz of stealing and applauding the theft of two well-cared-for dogs. (The dogs were actually abused and neglected which changes the public's perception on the plaintiff's position).

5. Eleven claims were brought because Sykes and the Journal Sentinel falsely accused Ms. Schultz of making a hang-up call. (The call was made to an answering machine. No person received a "hang-up" call.

6. One claim was brought because the Journal Sentinel falsely reported that animal rights activists "broke ranks" and turned on Ms. Schultz. (This is libelous because the reporter knew that dog breeders are the opposite of animal activists and that breeders called the police.)

7. Two claims were brought because Charlie Sykes falsely reported that Ms. Schultz lied about the filing of a "Fine for Supreme Court" campaign finance report.

Concerning #1 above, Ms. Schultz conceded before summary judgment [24] that she could not show actual malice with clear and convincing evidence regarding Sykes statements that she committed and condoned a felony. She abandoned those claims because the dismissed misdemeanor charge made it impossible to prove actual malice. Concerning #5 above, Ms. Schultz conceded that she could not prove actual malice because she did make a phone call but got an answering machine. Plaintiff could, however, prove negligence on the claims in #1 and #5. Therefore, if the court of appeals concludes that Ms. Schultz is not a public figure, the claims in #1 and #5 should be restored. The other claims should be restored even if the court of appeals does not overturn the public figure determination because Ms. Schultz can show actual malice.

Concerning #6 above, the Journal Sentinel published the following statement on May 24, 1996: "The case was solved after members of the animal rights movement apparently broke ranks and turned in Schultz after a story on the situation appeared in the Journal Sentinel." [A-AP-287] This statement was false. Dog breeders, the exact opposite of animal rights activists, not affiliated with the animal rights movement called the police with the location of the dogs.

Ms. Rohde, the reporter, testified that she relied on her interview with the detective, who investigated the dognapping, for that report [27:Rohde #2 at 34]. Detective Przbylinski, however, testified that he told Ms. Rohde that dog breeders called him with the location of the dogs [131:Ex.13 at 80]. Ms. Rohde's own notes, that she supplied at her deposition of July 17, 1998, said "they were breeders." [27:Rohde #1 at 94]. Ms. Rohde also testified that she had the names and locations of the dog breeders to whom she referred to as the "animal rights activists" who "broke ranks." [27:Rohde #2 at 35]. Thus, Ms. Rohde knew that Ms. Schultz was not spurned by her peers in the animal rights community.

Concerning #2 above, Journal Sentinel, Inc. published the following statement in an article in the Milwaukee Journal Sentinel on March 3, 1996: "McDowell (the Milwaukee County humane officer) went to the Smith home January 11 and saw that the dogs had what he considered adequate food, water and shelter." In an affidavit [*7][25], Ms. Rohde, the reporter, testified that she reviewed police reports and interviewed the detective and police chief prior to falsely reporting that

---

[25] This affidavit should be with Record Item #7. However, it is actually with Record Item #24. Defendants exhibits for their first summary judgment motion somehow got assembled in the record with plaintiff's response to the first summary judgment motion. Whenever there are cites to exhibits in Record #24 that should be in 7 it will be listed with an asterisk, e.g.[*7].

humane agent McDowell found the dogs to have adequate food and water [*7:50-54]. However, the police reports contained McDowell's reports that the owners of the dogs had violated § 951.13(1), Stats., by failing to provide food to their dogs. His report further indicated that the dog house was not large enough for the two dogs [26:62-67]. Other humane society reports in the records indicated that the dogs appeared sick, that the female had scabs on her legs, major hair loss, and sunken runny eyes [27:McDowell,29,30,33,40]. Detective Przbylinski testified that he did not tell Rohde the dogs had adequate food, water and shelter [181:Ex.13 at 83].

In her deposition, Ms. Rohde contradicted herself repeatedly on when and how she received the police reports. Telephone records, however, indicated that the police called Ms. Rohde on February 13,15,27 and March 3 and 5, 1996. They faxed reports to her on February 13, March 5 and 15, and April 2, 1996. [216:Ex. 101-02,05, 06,07,08,10]. Additionally, a memo from Ms. Rohde to Mr. Kritzer, counsel for the Journal Sentinel, indicates that she had all of the police reports in her file [26:90].

Concerning #2 above, as it relates to Charlie Sykes, when the court granted summary judgment on this, it said, "This one was more troubling to me....This is a much closer call." [A-AP:181] Mr. Sykes repeatedly reported that Ms. Schultz had "whipped up a frenzy," "complained to authorities," was "actively involved in filing and monitoring the complaints," was "making phone calls to the house," "was up to her elbows in the harassment of the family," "targeted the family with a very concerted campaign" "in a big way" that went on for a year, was "deeply involved in the harassment," and that she "admitted" to this on his show [A-AP:203-81]. None of what Mr. Sykes said was true. At his deposition, Mr. Sykes admitted that he had no basis to believe any of these things[A-AP:516]. Sykes testified that he had police reports [A-AP:519-20]. Those reports clearly show that it was neighbors filing the

complaints and that there was no "campaign" of "harassment" being conducted by anyone much less Ms. Schultz.

Concerning #7 above, in his broadcast on July 27, 1996, Mr. Sykes read from a Journal Sentinel article concerning the late filing of Judge Fine's campaign finance report. "Schultz said she thought that Behrend had dropped the campaign finance report in the mail Monday to comply with the filing requirements." Sykes then commented sarcastically, "ya sure she did,." and then said, "It was her responsibility to comply with the law and get the report in on time. She is the campaign manager for Ralph Adam Fine. But here she is lying again to get herself out of hot water."

The trial court ruled that Ms. Schultz could not prove actual malice because Mr. Sykes based his comments on the article, but the article does not call Ms. Schultz a liar. Moreover, Mr. Behrend, the campaign treasurer, testified in his deposition that, when he heard the broadcast, he knew it was false because he not only had told Ms. Schultz that it was filed but he also told the articles' author that he had told that to Ms. Schultz[94:Behrend depo.,38-39, 25].

The tape of this broadcast is not available even though Ms. Schultz put Journal Communications and Mr. Sykes on notice to preserve all tapes while she assessed their liability. They refused to provide and destroyed this and other tapes of the Sykes' broadcasts. [A-AP:325-27] The destruction of these tapes could be sufficient evidence to support a verdict of actual malice. Torgerson, 210 Wis.2d at 549.

Ms. Schultz is an animal rights activist. She did not sue Sykes and the Journal for reporting that she was a suspect in and charged with dognapping. She sued the Journal and Sykes because they accused her of things qualitatively more damaging to her reputation than being charged with the misdemeanor of hiding two abused dogs. They falsely accused

her of a felony and of spending a year harassing a family for letting two well-cared-for and loved dogs stay outside in the wintertime. They also falsely accused her of failing in her duties as a campaign manager. They held her up to ridicule and attacked her reputation in such a way that actual malice can be proven, as shown above.

V. THE COURT ERRED WHEN IT RULED THAT PLAINTIFF IS A LIMITED PURPOSE PUBLIC FIGURE

Ms. Schultz maintains that she is not a public figure or limited purpose public figure. Publicity does not make a person a public figure. Time, Inc. v. Firestone, 424 U.S. 448 (1976). A person's right to be free from damaging falsehoods gives way to public debate only when there is truly a public controversy being publicly debated, and only when the damaging statements contribute to that debate. Gertz, 418 U.S. 323, 352 (1974). A newspaper or radio station cannot wrap itself in the First Amendment to wage a personal war of falsehood against an individual, even an individual with public visibility.

Ms. Schultz had public visibility because she was campaign manager for various candidates for public office and she was active in animal rights. However, in both of those, she was a private person doing public things, as every private person does.

Ms. Schultz is also not a public figure is because there was no other media outlet, other than those owned by the Journal Company, i.e. the Journal Sentinel and WTMJ, that covered the dognapping and the Fine report. A basic principle of First Amendment law is that a person cannot be made a public figure by the publication which defames them. Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979); Denny v. Mertz, 106 Wis.2d 636, 651, 318 N.W.2d 141 (1982).

The brief of the other appellant, Animal Lobby, Inc., will treat this matter further, and those arguments are incorporated here by reference.

CONCLUSION

For all of the above reasons, plaintiff asks the court of appeals to reverse the dismissal of this case so that the two claims which two courts decided had merit can be tried. She asks the court to vacate the judgment for statutory costs, attorneys' fees and non-statutory costs. She also asks the court to reverse the summary judgment on the 78 dismissed claims because she can prove actual malice, and to reverse the trial court determination that she is a public figure.

In the alternative, if the court of appeals does not reverse the dismissal of this case, plaintiff requests the court to vacate the judgment because there was no statutory or case law authorizing the court to award attorney's fees and non-statutory costs in a case that was not frivolous.

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Pet 281

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

CYNTHIA A. SCHULTZ and
ANIMAL LOBBY, INC.,

Plaintiffs-Appellants-Cross Respondents

v.

Appeal No. 00-0915

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP,
and **JOURNAL SENTINEL, INC.,**

Defendants-Respondents-Cross Appellants

REPLY BRIEF OF APPELLANT SCHULTZ

ON APPEAL FROM AN ORDER AND JUDGMENT OF
THE CIRCUIT COURT OF MILWAUKEE COUNTY
HON. FRANCIS T. WASIELEWSKI, PRESIDING
CIRCUIT COURT CASE NO. 98-CV-000724

ATTORNEY Robert E. Sutton
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(Cross Appeal Withdrawn)

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Respondents' brief contains many errors which cannot be addressed in the limited space of this brief. This should not be taken as an admission that everything, not addressed, is correct. Volume 3 of appellant's Appendix accompanies this reply brief. Arguments in Animal Lobby's reply brief are incorporated here by reference.

I. RESPONDENTS' ARGUMENTS FAIL TO SHOW THAT THE PROCESS WAS AUTHORIZED BY LAW AND WAS CONSTITUTIONAL. THEY ERRONEOUSLY ARGUE THAT OTHER WITNESSES CORROBORATED MR. ENGEL'S STORY ABOUT ATTEMPTED SUBORNATION OF PERJURY.

Respondent's brief is based on the false premise that both perjury and subornation of perjury were proved against Ms. Schultz and that the proof took place in a legitimate court proceeding leaving sufficiency of the evidence as the only issue to decide.

The trial court, however, never found Ms. Schultz guilty of perjury or subornation of perjury. The court explicitly stated that it did not find perjury. The court's actual finding was that Ms. Schultz committed attempted subornation of perjury [B-AP:1164-65]. Moreover, the defendants conceded in court that the court did not find perjury [B-AP:1164-65].

Additionally, when a jury trial is paid for and requested as in this case, it is within the province of the jury to determine sufficiency of the evidence. Plaintiff contends, in this appeal, that the process, in which the credibility of witnesses was determined and evidence was weighed, deprived her of her right to a jury trial and violated her constitutional rights. Therefore, the sufficiency of the evidence is not a valid issue on appeal. However, if the court finds that the process was legitimate, appellant's position is that there was not sufficient evidence for the trial court to find Ms. Schultz guilty of attempting to suborn perjury. It was a blatant misrepresentation for the respondents to say on p. 1 of their brief that appellants "concede...that ample evidence supported

the sanctions imposed here." Respondents repeated that misrepresentation at p. 24. Appellant's brief at pp. 15 & 16 and elsewhere says exactly the opposite.

Regarding the illegality and unconstitutionality of the process and the dismissal of the case, appellant anticipated most of the cases on which respondents now rely. Thus, those were distinguished at pp. 19-25 of appellant's brief. The new cases that respondents cite at pp. 12-20 simply quote, out of context, from cases that are irrelevant to the instant case. Hur v. Holler, 206 Wis.2d 335, 557 N.W.2d 429 (Ct. App. 1996) was the only new case cited by respondents that involved a dismissal that was upheld. That case was also dismissed pursuant to §804.12 and § 805.03, Stats. for plaintiff's repeated disobedience of court orders. Wisconsin statutes authorize dismissal for disobedience of court orders. There was no disobedience of court orders in the instant case and the court could find no authority for the procedure and for the dismissal of the case.

Respondents' argument concentrates on sufficiency of the evidence. Their argument is that Clary Engel's testimony that Ms. Schultz asked him to steal and, after he refused her, that she told him she stole the Whitefish Bay dogs was corroborated by June Ellen Jones, Barbara Manson, U.S. Attorney Joe Wall, Ms. Schultz's sister, Ms. Schultz's attorneys, and Ms. Schultz's own notes and affidavit. The record, however, demonstrates that no one corroborated Clary Engel.

Before discussing this non-corroboration, it is important to note that the bench trial, within this defamation case, was about whether or not Ms. Schultz was involved in a dognapping that was the subject of a dismissed misdemeanor party to a dognapping case and that had nothing to do with the claims in this case. Thus, the entire process was the result of a smokescreen sent up, by the defendants, to avoid a jury trial on defamation claims in which Sykes and the Journal had falsely reported that Ms. Schultz and the Animal Lobby, Inc. had a dog killed and carved up to get publicity and to prove a political point. Thus, although the following discussion

addresses the dognapping issue, it is only to prevent the respondents' accusations from going unanswered. It is not a concession that the dognapping smokescreen was even remotely material to the claims that were scheduled to go to a jury.

Respondents say at p. 11 that "Ms. Schultz admitted that only if Mr. Engel, Ms. Manson, Ms. Jones were all lying could her version of events be true." Ms. Schultz admitted no such thing. In fact, the record shows that only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston, Ms. Rowe, Ms. Majerus, Ms. Volke, Ms. Kiedrowicz and Mr. Ehlinger were all lying could Mr. Engel's version of events be true. For this preposterous statement on p. 11, defendants cite to portions of Ms. Schultz's cross examination. However, the record shows that, in that cross examination, Ms. Schultz was forced by the court to repeatedly respond to fabricated hypothetical questions [B-AP:1157]. Ms. Schultz objected to certain questions because their assumption was not true. The court intervened and told her she should not argue with the premise of the question [B-AP:1157]. Regarding the non-corroboration of Engel, June Ellen Jones and Barbara Manson never corroborated any of Mr. Engel's testimony that Ms. Schultz stole the dogs or that she even told them that she stole the dogs. The testimony of Ms. Jones and Ms. Manson that they had phone conversations with Ms. Schultz about the dogs does not corroborate Engel and does not prove that Ms. Schultz stole the dogs. Ms. Schultz has always admitted that she knew the whereabouts of the dogs. Judge Foley recognized this during the first summary judgment hearing in this case in September 1998: "She also acknowledged being involved in the post-theft relating of the dogs, if you will." [B-AP:1167-68]. Additionally, Ms. Jones repeatedly testified that Ms. Schultz told her she did not steal the dogs [B:AP:1075]. Respondents cite June Ellen Jones' statement in a police report as corroborating evidence [D632]. However, Jones testified that what was in the report was "not what happened" and that the affidavit in this case, that defendants traveled to Illinois to get her to sign, was not accurate [B:AP:1079].

Neither did U.S. Attorney Joe Wall corroborate Mr. Engel. He simply repeated what Engel allegedly told him. In fact, Mr. Wall testified that he could not vouch for the truthfulness of Mr. Engel. [B-AP:1021]. Mr. Wall also testified that Clary Engel never told him that Engel tried to get money from the Journal and Sykes on the evening that Engel called him before his first deposition [B-AP:1023]. Engel first testified that he called Wall and later even denied making the call to Wall [B-AP:1014]. Even the trial court, in its decision, said it was giving less weight to Mr. Wall's testimony. The court called it "dependent corroboration" [A-AP:112] because it was dependent upon what Engel told Wall.

At page 24, respondents say, "No one supported Ms. Schultz's version of the events, not even her own sister." Respondents could give no cite for this allusion because Ms. Schultz's sister was not a witness at the dognapping bench trial that was substituted for the defamation jury trial. Respondents, however, even try to use that against Ms. Schultz. On p. 27, they call her sister a "missing witness" in the illegal hearing. Yet, respondents themselves served Ms. Kiedrowicz with a subpoena [B-AP:1161] only to withdraw it when a review of her deposition revealed that her testimony supported Ms. Schultz's version of the events [B-AP:1024].

Respondents imply, at p. 28, that Ms. Schultz attorneys corroborated Mr. Engel. In fact, her attorneys corroborated Ms. Schultz's statements that Ms. Schultz was a very active participant in her own defense and that she drew up a list of questions and answers for all of her proposed witnesses and that her attorneys had those outlines along with the outline of Mr. Engel's testimony [B-AP:1059, B-AP:1073]. Furthermore, the court, in its' decision specifically said that it believed Attorney Ehlinger's affidavit testimony [A-AP:116-17] that Mr. Engel had called him to give him a statement [B-AP:1001] even though Mr. Engel testified that he never gave Mr. Ehlinger a statement [A-AP:540]. Attorney Lisa Rowe had a similar situation where she testified that Engel spoke to her and gave her a statement [B:AP:1055]. Engel testified that he never spoke to Lisa Rowe [B-AP:1062B].

In discussing the alleged "scripts," respondents ignore that they were drawn up in 1997, prior to the filing of this action, for an entirely different case over which the trial court, in this case, had no jurisdiction. Moreover, at pg. 7, the defendants say that Ms. Schultz had "included Mr. Engel's false alibi in her plans for this lawsuit." Plaintiff's preliminary witness list, that was not filed with the court and only given to the defendants [B-AP:1082], shows that Mr. Engel was not listed as being able to give any testimony about the dognapping. He was listed as a possible witness who claimed he heard the Sykes's broadcast about Ms. Schultz killing and carving up a dog [B-AP:1087]. This witness list was put together five months before Engel claimed that he was first asked him to give false testimony about hearing the Sykes's broadcast.

Respondents claim, at p. 6, that Ms. Schultz's summary judgment affidavit falsely claims that she played no role in connection with the dogs and helping to place them, so that her affidavit contradicts Ms. Jones and Ms. Manson and therefore corroborates Mr. Engel. This is simply not true. Ms. Schultz affidavit clearly states her involvement:

> My involvement with the Smith dog incident after the dogs were taken was, as I truthfully reported to the police, restricted to receiving an anonymous call from an individual who told me he had taken the dogs, telephoning Phyllis Wexler to tell her that I had heard the dogs had been taken, speaking to the police, videotaping the premises from which the dogs had been taken on the following day with the knowledge and at the request of the Whitefish Bay Police Department, and returning and taking phone calls from individuals who had been asked to attempt to locate individuals who would care for the animals. [D:651]

Thus, respondents misrepresented Ms. Schultz's position when they said at p. 3, without any cite, that she

"showed every sign of wanting to exculpate herself."

Not only do defendants falsely argue that Mr. Engel's testimony was corroborated, they also whitewash Mr. Engel's testimony. They say, at p. 25, that he was "confused about a deposition preparation session" when in fact he repeatedly lied, was evasive and "feigned confusion" about his contacts with defendants' attorneys [A-AP:413,491,498,499]. Respondents argued that appellants attempted to make the five hour prep session, between Mr. Engel and three lawyers at Foley and Lardner, sound sinister by calling it a "mock trial." However, it was the defendants, themselves, who called it a "mock trial" in their bills submitted to the court when they asked to be paid $5,950.50 for that session [B-AP:990]. It was also the defendants who chose not correct Mr. Engel's deceptive and false testimony thus keeping his mock trial and other meetings secret from the court until after the court dismissed the case. Respondents imply at p. 26 that there was no truth to appellants' statement that Mr. Engel tried to get money from the defendants. Yet, after telephone records divulged the calls to the defendants and proved Mr. Engel's deposition testimony to be false, Mr. Engel himself finally admitted that he asked the Journal and Sykes for money [A-AP:402]. This is entirely consistent with Ms. Schultz's testimony that Engel had asked her for money. That testimony was corroborated with telephone records showing Mr. Engel's calls to Ms. Schultz right before calling Sykes and the Journal and again on the day before and of his deposition [A-AP:420].

Ironically, the court itself showed that Mr. Engel could not be believed. The court specifically said it could not find that Ms. Schultz was guilty of the dognapping. "The suborned perjury here does not in the Court's view show that the plaintiff committed the dognapping. The guilt with respect to the dognapping does not in the Court's view necessarily follow from the fact of the attempted subornation of perjury." [B-AP:1013].

II. THERE IS NO STATUTORY OR CASE AUTHORITY FOR THE FEE AWARD. THE AWARD WAS UNREASONABLE BECAUSE IT WAS AN EXCESSIVE FINE THAT WAS NOT CALIBRATED TO DEFENDANTS' DAMAGES.

Respondents' argument for attorneys fees relies on Lathan v. Casey & King Corp., 23 Wis.2d 311, 127 N.W.2d 225 (1964), Johnson v. Allis Chalmers Corp., 162 Wis.2d 261, 470 N.W.2d 859 (1991), and Hur v. Holler, 206 Wis.2d 335, 557 N.W.2d 429 (Ct. App. 1996). However, the fee award in these three cases was authorized by statute, either § 804.12 or § 805.03 Stats., allowing a court to grant sanctions for disobedience of court orders. The instant case involved no disobedience of court orders. Thus, there is no statutory basis for the attorney fee award in this case, and Lathan, Johnson, and Hur do not provide authority for the award.

Respondents rely heavily on Schaefer v. Northern Assurance Co., 182 Wis.2d 148, 513 N.W.2d 615 (Ct. App. 1994). In Schaefer, the trial court dismissed a nine year old case on summary judgment when it reasoned, pursuant to §632.34 Stat., that an admitted conspiracy among plaintiffs relieved Northern Assurance of its duty to indemnify or defend any party due to the non-cooperation clause in the insurance contract. The court entered judgment against Schaefer in the amount of $8,804.00 that resulted from the trial court's previous decision to assess attorney fees as a condition for permitting the case to go forward after perjury and conspiracy was admitted four years earlier. The appeals court found that the fees, in Schaefer, were awarded for the retaking of depositions that were caused by the misconduct of the plaintiff and were necessary to uncover the conspiracy that defeated the claims in the case. It is a perversion of Schaefer to argue that Schaefer provides authority for what the court did in this case. In this case, the trial court, without statutory authority, conducted a bench trial to assess the credibility of witnesses not proffered to the court as witnesses to be called in the instant civil defamation case, dismissed a meritorious case, that the court and defendants recognized as having a multi-

million dollar value [B-AP:1150, 1146], and assessed an excessive criminal fine in the amount of $155,797.31 that it awarded to the defendants. The trial court and the defendants acknowledged that the judgment was the result of a fine when the defendants garnished Mr. Schultz's wages:

> MR. BARGREN: This was a penalty or a fine. Really a sanction. And that's how Judge Wasielewski described it. An interesting area that I hadn't thought about until you just mentioned that analogy would be any case law on the issue of a criminal fine, and whether or not that can be satisfied against the entire marital estate or against only the criminal defendant's interests in marital estate.[B-AP:1142]
>
> THE COURT: The only thing that I would possibly find controlling is if there was some case law saying that in a situation where someone committed a crime, and there was either an award of restitution or there was a fine itself, and the governmental body in that case for the fine would be attempting to collect the fine, and could you collect it against the entire marital estate, or would it only be the interest of, that criminal's interest in that case, in the marital estate. [B-AP:1144]

Respondents argue, at p. 36, that the fee award was justified because the trial court "could have" found that the case was frivolous under § 814.025, Stats. The respondents filed their motion for fees under §814.025 Stat. The trial court denied their motion. It is absurd that the respondents now argue that the case is frivolous because the trial court "could have" found the case frivolous, even though it did not.

Respondents cite Lenhardt v. Lenhardt, 2000 WI App. 201, 238 Wis.2d 535, 618 N.W.2d 218, as their authority for the "could have" argument. However, respondents dropped their

cross appeal in this case and Lenhardt does not stand for the proposition that an appellate court, without an appeal, can find a case frivolous when a trial court decided that it was not.

Respondents claim, at page 33, that appellants do not challenge the reasonableness of the fee award. That is incorrect. Appellants contend that, when the court could not invoke the test for reasonableness of fees on to a non-compensatory fine.

First, the fine was not calibrated to defendants' damages because defendants were not prejudiced and had not incurred any fees resulting from the alleged attempted misconduct. The trial court simply unjustly rewarded the defendants for prosecuting the dismissal of a meritorious case.

Defendants chose not to send Mr. Engel to the proper authorities with his claims of criminal conduct because they wanted to control and orchestrate the evidence and the testimony in order to use it to avoid a jury. Defendants' chief counsel admitted this in testimony at the fee hearing. He said that defendants had not succeeded in getting summary judgment on two of the claims and so "[t]here was a risk that those claims would go to a jury [and] [d]efamation lawyers don't like juries." He continued, "When Mr. Engel came forward with his report...it presented us with a good opportunity to avoid a jury...." [B-AP:1151, 1150]. The court agreed [B-AP:1146].

Clearly, almost $50,000.00 of the fine was not calibrated to damages because it was added after the court dismissed the case [B-AP:970-1000].

Additionally, as the court itself stated, the fine was not just punishment for the attempted misconduct that the court thought was about to take place in this case. The court said it was also punishment for misconduct that the court thought had taken place in the prior dismissed party to a dognapping case [A-AP:145]. The court had no subject matter jurisdiction to levy a fine for misconduct in a case not before the court and

then call the fine "reasonable" because it paid the fees of attorneys for doing a good job by getting a meritorious case dismissed [B:AP:1146].

CONCLUSION

For the foregoing reasons and for reasons set forth in the appellant's brief, the court of appeals should grant appellant the relief requested in her brief.

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STATE OF WISCONSIN: CIRCUIT COURT
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.
PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,
DEFENDANTS.

March 10, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

ALEX FLYNN, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

*****

would have that attached.

MR. FLYNN: That is '97. Things changed.

THE COURT: That is true.

MR. FLYNN: The circumstances change. The attachments are kind of the other exhibits that I have got here on the report that were prepared in connection with the underlying case. A '97 attachment is not going to have much relevance in 2000. That is certainly something to be inquired into on cross-examination. If we can, Your Honor, just mark these?

MR. HUSTON: I have the two expert reports on losses that were allegedly suffered as a result of the pleaded libels in this case. I would object to their admission for the same reasons that I would object to them if they had been offered during the trial. I also object also object that I don't think they have anything to do with the plaintiff's ability to pay. Her ability to pay can be readily proved from a financial statement that we are not being offered. So I would object to the admission of these two reports.

THE COURT: Just the fact that there have been some financial reversals, given that part of the picture without the total picture against which to measure an ability to pay, that doesn't help us much, Mr. Flynn. We don't have any idea of the size of or the number or type of assets there are.

MR. FLYNN: Well, this is --

THE COURT: So without that we are just being given a part of the picture that the plaintiff has chosen to disclose to us; the bad news. We don't know any of the good news. That's half of the picture.

MR. FLYNN: That is what I want to present is her ability to pay. I think the Court has to take that into account.

MR. HUSTON: These expert reports are pure hearsay.

THE COURT: What kind of reports are they?

MR. HUSTON: These are the reports that she retained during the litigation to express opinions as to the losses that were suffered (1) by the Animal Lobby and, (2), by Ms. Schultz herself as a result of the pleaded defamation. It's not just the surviving ones, but all of them.

THE COURT: You can't get the report in here without offering the testimony of the expert. That is pretty basic stuff. I will sustain the objection to the expert reports on the basis of hearsay.

MR. FLYNN: We don't have any evidence on it. Can I put some evidence on it in? They have not even been marked. I would like to have them marked. (Exhibits 13, 14 and 15 marked by the reporter.)

MR. HUSTON: To clarify the record, I would object to admission of 13 and 14 on the ground of hearsay. I don't object to the admission of 15, but I do call attention to the fact that the financial statements are not being offered along with the rest of this contract.

MR. FLYNN: If I could ask to be allowed the to create a foundation and a means of making these admissible?

THE COURT: Go ahead.

MR. FLYNN: We call Ms. Schultz.

CINDY SCHULTZ having been first duly sworn was examined and testified as follows:

EXAMINATION

BY MR. FLYNN

Q. Ms. Schultz, you have seen Exhibit 15, the marital

settlement agreement?
A. Yes.
Q. And is that your and your husband's signature on the last page?
THE COURT: I think there is an agreement that can come in. There is no objection as to that. 13 and 14 are objected to, am I correct, Mr. Huston?
MR. HUSTON: That's correct, Your Honor.
MR. FLYNN:
Q. Exhibit 13, I would ask if you can identify this document?
A. This is a report done by Norb Schlict (phonetic) who is a certified public accountant. He did the report because Mr. Elhinger asked him to do it.
Q. You provided Mr. Schlict tax returns and financial documents in which to prepare that?
A. Yes.
Q. Keep looking at Exhibit 13. You have personal knowledge of the tax returns and other financial documents which you gave to Mr. Schlict in order to prepare that report?
A. Yeah, I know about them.
Q. Does Exhibit No. 13 accurately reflect the records that you keep regarding financial documents upon which Mr. Schlict based the record?
A. Yes.
Q. I want to draw your attention to Exhibit 14 and ask if you can identify this document?
A. That is the other report.
Q. What is that report for? Would you identify that, please, in more detail?
A. The report that Norb Schlict did on the economic loss to Cynthia Schultz.
Q. More specifically your consulting business?
A. Political consulting, correct.
Q. And you provided for him tax returns and other financial documents that you regularly keep in your records for him to prepare that report?
A. Yes.
Q. And you are personally familiar with those documents and those figures?

A. Yes.
Q. And does that report, Exhibit No. 14, accurately reflect the figures taken from the tax returns and other financial records that you keep?
A. Yes.
MR. FLYNN: Thank you. I have no further questions. I would move Exhibits 13 and 14 into evidence at this time.
MR. HUSTON: May I voir dire the witness?
THE COURT: Yes, you may.

EXAMINATION

BY MR. HUSTON
Q. Ms. Schultz, you gave certain financial information to Mr. Schlict, correct?
A. Yes.
Q. He then organized that information in a way that it was not organized in your tax returns themselves, correct?
A. I don't know.
Q. You don't know?
A. Un un.
Q. He drew some conclusions after organizing this material in the way that he chose to organize it, correct?
A. I don't know.
Q. Would you agree with me, though, that Exhibits 13 and 14 contain Mr. Schlict's thoughts and conclusions about the tax returns and other information that you gave to him?
A. I would think so yes. To be honest, I have not even read this. I just got this from Ralph. I have not even seen these things.
MR. HUSTON: Okay. Your Honor, I object to their entry because they are hearsay and because Ms. Schultz has not laid a foundation that would warrant their admission over the hearsay objection.
A. No, I read this part. I have not read all of the writing about his conclusions.
THE COURT: All right.
MR. FLYNN: If I could follow up on that a little more so that the record is clear?
THE COURT: I think the record is abundantly clear now. You will not get these in without Mr. Schlict. That is what I said

about 10 minutes ago. You wanted to lay a foundation which I knew you couldn't lay. I gave you the opportunity to add it. I am not surprised that you were not able to do it. You need quite a slight of hand to be able to get this in without Mr. Schlict here. The hearsay objection is sustained. 13 and 14 will not be received.

MR. FLYNN: She says she hadn't read its text.

THE COURT: I don't care whether she hadn't read it or not. It has nothing to do with my ruling. The fact is she is not the preparer of the document. The preparer is not here to be cross-examined on the facts and the conclusions and how the conclusions were reached.

MR. FLYNN: All right.

THE COURT: Okay. You may step down, Ms. Schultz. Thank you.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

) SS

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on March 10, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 12th day of July, 2000, in Milwaukee, Wiisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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SUPREME COURT
STATE OF WISCONSIN

CYNTHIA A. SCHULTZ,
Plaintiff-Appellant,
ANIMAL LOBBY, INC.,
Plaintiffs-Co-Appellants

v.

Appeal No. 00-0915

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP,
and JOURNAL SENTINEL, INC.,
Defendants-Respondents

MOTION FOR JUSTICE ABRAHAMSON AND JUSTICE BRADLEY TO WITHDRAW AND MOTION TO RECONSIDER DENYING REVIEW AND MOTION TO VACATE THE APPELLATE COURT DECISION

Cynthia A. Schultz, acting pro se, moves for the withdrawal of Justice Shirley Abrahamson and Justice Ann Walsh Bradley and, upon their withdrawal, for the remaining members of the court to reconsider it's refusal to grant review and, upon granting the review, to vacate the decision of the court of appeals and to assign this case to an independent appellate panel of judges for an unbiased appellate review.

I. Justice Abrahamson and Justice Ann Walsh Bradley should withdraw from deciding this motion.

In 1989, Ms. Schultz ran Judge Ralph Adam Fine's campaign to unseat Justice Abrahamson from her position on the Wisconsin Supreme Court. The campaign was considered one of Wisconsin's most bitter judicial contests.

In addition to running a campaign to unseat Justice

Abrahamson, Ms. Schultz was the editor of a widely distributed newsletter for Windway Capitol, Corp. in which she questioned the legality of the independent expenditures of "Citizens for an Independent Judiciary" and "Prosecutors for Abrahamson" and the ethics of Justice Abrahamson's reliance on them in her race for Wisconsin Supreme Court. These criticisms appeared in the first complementary issue of the *Wisconsin Hot-Line* distributed to over 10,000 political types including to all of the judges and justices in Wisconsin.

In 1995, Ms. Schultz ran Appellate Court Judge Rogensack's campaign against Justice Ann Walsh Bradley.

Ms. Schultz's significant role in campaigns to defeat Judge Abrahamson and Judge Bradley require that they disqualify themselves from deciding this motion and further matters in this case.

II. This court should reconsider their decision to deny review of this case and should vacate the decision of the 4th District Court of Appeals

At the start of this case, Judge Wedemeyer, Judge Curley and Judge Cane were on the appellate panel deciding matters in this case. Judge Cain was brought in to comprise the panel of three after Judge Fine and Judge Schudson immediately withdrew upon the filing of this case.

Judge Cane was later replaced by Judge Margaret Vergeront of the 4th District without reason.

In the middle of the appellate process and after making three major decisions in this case, Judge Wedemeyer and Judge Curley withdrew from the case without explanation.

Judge Vergeront was the only judge remaining on the case and the case was removed to the 4th District where Judge Dykman and Judge Lundsten replaced Judge Wedemeyer and Judge Curley.

Judges Vergeront, Dykman and Lundsten were responsible for the opinion in this case and in John Schultz's garnishment case.

A. Appellate Court Judge Margaret Vergeront failed to disclose that she was the sister of David Vergeront.

Judge Vergeront should have disclosed that she was the sister of David Vergeront before she agreed to be imported in as the third judge on the District I panel to replace Judge Cain without reason.

On August 25, 1994, during a campaign between Representative Tim Hovan and Eric Grant to fill Susan Vergeront's assembly seat, Ms. Schultz filed a complaint against David Vergeront, the campaign chairman for Eric Grant, regarding David and Susan Vergeronts' "independent" expenditures on behalf of the Grant campaign. Susan Vergeront was quoted in the August 26, 1994 Milwaukee Journal as saying that Ms. Schultz was "full of baloney" and "acting as somebody's puppet" and a subsequent September 7, 1994 statewide Journal article said that as a result of Ms. Schultz's complaint, "the Elections Board is investigating a charge that Vergeront and her husband improperly funneled money to a political action committee they established to specifically support Grant." David Vergeront, Judge Vergeront's brother, stepped down from his leadership role in the Grant campaign as a result of Ms. Schultz's complaint. [Ex:A]

The Milwaukee Sentinel articles were published in their out state editions that covered Madison where Judge Vergeront resides.

Additionally, the articles were contained as exhibit numbers 282-285 attached to the defendants' brief supporting their motion to declare Ms. Schultz a public figure [8:103] and further described in an index to those articles as follows:

> "Cindy Schultz of Citizens for Change, filed a complaint against Mr. And Mrs. Vergeront, alleging they made an illegal campaign contribution."
>
> "Vergeront Defends Contribution to GOP Candidates Campaign"
>
> "Cindy Schultz filed a complaint, questioning whether the independent expenditure made to benefit Eric Grant is truly independent because David Vergeront is treasurer of Grant's campaign."
>
> "Cindy Schultz filed an elections complaint against Assembly candidate Eric Grant and Rep. Susan Vergeront. Complaint focused on independent expenditures made on Grant's behalf by Vergeront."

Given the press reports and the inclusion of those press reports as exhibits in the record of this case [Ex:E], it would strain credibility to believe that Judge Vergeront was not aware of and affected by the bad blood between Ms. Schultz and Judge Vergeront's brother.

Clearly, a reasonable person would suspect that Judge Vergeront's participation in this case violated the due process rights of all of the appellants in this case and in the garnishment case of John R. Schultz.

Because Judge Vergeront did not disclose her relationship to David Vergeront and because her participation in deciding the appeal in this case tainted the entire process, the appeals court decision should be vacated and an independent panel of three judges should be assembled to review this case.

B. Judge Charles Dykman's interviews with the Journal Sentinel, a defendant in this case, lent to the appearance of injustice.

Sometime before December 11, 2001, Judge Dykman was conducting interviews with and seeking favorable press from the Journal Sentinel for his 2003 candidacy for the Wisconsin Supreme Court. These interviews resulted in a December 11, 2001 Journal Sentinel article, "Lawyers line up to pound biggest gavel," in which Judge Dykman is extensively quoted. [Ex:B] This article appeared almost immediately after Judge Dykman and the other 4th District judges were supposed to have completed a review of the petition for review to this court to decide whether to reconsider their decision.

Just as the appearance that justice is not satisfied by Judge Wasielewski's and the Journal lawyer's public solicitation of funds for Joe Wall, a Circuit Court judge who, to help the Journal in this case, vouched for the testimony of his friend, five time convicted felon, Clary Engel. [Ex:C] So is not the appearance of justice satisfied by Judge Dykman's interview with the Journal Sentinel to get press for a campaign that is over a year away immediately after he decided not to reconsider his opinion, in favor of the Journal, that contained over twelve distortions of the facts in the record and of the arguments in the appellant pleadings.

III. The uncorrected false supreme court memo of September 16, 1993, referring to Ms. Schultz and the Animal Lobby, Inc., distributed to all appeals court, circuit court and supreme court judges, instilled a prejudice in all judges who received this memo.

On September 13, 1993, the director of state courts, under the Wisconsin Supreme Court letterhead, directed a memo to all supreme court, appeals court and circuit court judges saying:

> "Animal-rights activists have recently launched a hate-mail campaign against one of *our* judges

> for a decision which was right, but unpopular. The group organizing against him was able to look up the addresses of his home and vacation cabin at the state Ethics Board."[Ex:D]

The memo was referring to Ms. Schultz and the Animal Lobby, Inc. and to the nationally publicized case where Judge Poppy, of Calumet County, dismissed animal cruelty charges against a man for shooting and cutting off the head of a dog to sell the dog for meat after Judge Poppy concluded that the California animal rights group, who set up the sting, was racist for paying an Asian couple to buy the dog and that Wisconsin permits dogs to be on the menu.[1]

Although the accusations against Ms. Schultz, made by the Director of State Courts and distributed to all judges in Wisconsin, were false *and* defamatory, the Director of State Courts never issued a correcting memorandum as was requested by Attorney James Ebbeson, representing the Fox Valley Humane Association and the Calumet County Humane Society, and by Ms. Schultz.[2] [Ex:F]

Instead, after having the indisputable evidence that Judge Poppy's vacation home address was not listed with the Ethics Board and that his telephone number and address were listed with the telephone company and in the telephone book and in information for the entire country to get after watching the reports of Poppy's bizarre decision on CNN and Hard Copy, this court let stand the perception that Ms. Schultz and her "group" had used Judge Poppy's ethics filings, that did not contain his vacation home address, to get his vacation home address to launch a hate-mail campaign against him when, in fact, Ms. Schultz never obtained Judge Poppy's vacation home address and never so much as wrote Judge Poppy a letter much less "launch a hate-mail campaign" against him.

---

[1]That case relates to the defamations in this case.

[2]The Wisconsin Supreme Court Justices received a copy of the request made by Ms. Schultz to Dennis Moran, the Director of State Courts.

In essence, the court's staff, under the direction of the Wisconsin Supreme Court, demonstrated a prejudice against Animal Rights Activists as a group and prejudiced every judge in Wisconsin against Ms. Schultz, with the exception of those judges who did not receive or were award of the obvious falsities in the supreme court memorandum. Included in those judges affected were Judge Wasielewski, Judge Dykman and Judge Vergeront.

IV. This motion is timely

Litigants do not start out thinking that they have to investigate the political and personal backgrounds of the judges deciding their cases. They do not start searching for evidence of prejudice until a judge's use of illegitimate sources of power or the dishonesty of an opinion prompts them to question and investigate whether ulterior motives influenced the process.

That is precisely what happened in this case and what made Ms. Schultz question whether Judge Vergeront was related to David Vergeront, whether any of the appellate judges were communicating with the Journal and whether the supreme court ever issued a retraction and correction on the 1993 letter that was sent out to every judge in Wisconsin. It was the numerous distortions of the facts in the record and the tortured twisting and spinning of the arguments in the appellants' pleadings, whenever the true facts would have required a reversal of the trial court's decision, that sent up the flag that prompted Ms. Schultz to investigate.

Additionally, there would be no need for this motion at all if Judge Vergeront would have disclosed her relationship with David Vergeront instead of forcing Ms. Schultz to embark on a genealogy research project to uncover the truth, if Judge Dykman would have disclosed that his run for Wisconsin Supreme Court was going to require him to communicate with and solicit favorable press and an eventual endorsement from the Journal Sentinel and if the Director of Wisconsin State

Courts would have sent out the corrective memorandum, that was obviously warranted, when this case was filed.

Furthermore, Ms. Schultz filed an open records request with the Court of Appeals on February 11, 2002 for the purpose of obtaining information that was, in part, to verify the facts contained in this motion. That request remains unanswered even though §19.35 Wis. Stat. requires a response "as soon as practicable and without delay."

Thus, this motion is timely but not entirely complete because of the appellate court's failure to comply with §19.35 Wis. Stat.

V. The appellate court opinion in this case suggests that Judge Vergeront's and Judge Dykman's prejudices influenced their decision.

The entire thrust of Ms. Schultz's appeal was that the four day trial court proceeding, requiring elaborate fact finding, was a constitutionally defective criminal proceeding that violated Ms. Schultz's procedural due process rights. The entire appeal was based on the facts that, Judge Wasielewski, authorized by his "inherent powers," conducted a constitutionally defective proceeding to severely punish Ms. Schultz and ALI by taking their cause of action [203:95] that the Journal valued in the "multiple-millions of dollars"[208:45,212:102,210:64,212: 101-103] and that Judge Wasielewski confirmed "ought to have been heard by a jury" who "could well have come in with a substantial verdict." [R.212:102]

The main issue on appeal was that Judge Wasielewski conducted a criminal bench trial and not an "evidentiary hearing" to take the plaintiffs' constitutional right to a jury trial and to impose a $168,944.97 unconditional open ended fine that increases for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken"[A-AP:154] in order to "penalize" Ms. Schultz and to "deter future misconduct" [203:92] and "maintain its (the court's)

integrity" [203:97] after finding that there was "no prejudice" or harm caused to the case or to the Journal [203:94, 208:59-61].

This argument was repeated throughout Ms. Schultz's entire appeal:

> "The hearing, in fact, turned into what even the court and defendants recognized was a bench trial on subornation of perjury. [202:191; 204:55,86; 208:31,59; 210:7,8,37,69; 211:12,13,71; 21:112]"
>
> "Plaintiff does not dispute that § 901.04, Stats., authorized the court to hold an evidentiary hearing prior to the jury trial to determine what evidence could come into the jury trial."
>
> "To allow a trial court to conduct a bench trial, in lieu of a jury trial, to decide credibility issues would create a cottage industry of side car litigation. It would allow trial courts to conduct grand jury investigations during the course of civil litigation in an attempt to "end run" jury trials and, as in this case, the criminal justice system."
>
> "Besides violating due process by becoming the trier of credibility, the court, in the instant case, violated plaintiff's due process rights in other ways. It conducted a criminal bench trial within a civil case and concluded that the dismissal was punishment for finding the plaintiff guilty of that crime[206:8-9].
>
> Since the bench trial was actually a trial and not simply an "evidentiary hearing," the burden of proof should have been the criminal burden.

In the published appellate court opinion, however, the court grossly distorted appellants' above main argument:

> "On appeal, Schultz and ALI assert that the circuit court: (1) was without authority to hold an evidentiary hearing."[¶1]

This distortion precluded any consideration of the real issue on appeal which was whether the proceeding, from which all of the sanctions in this case stemmed, was constitutionally defective because of its criminal nature.

Even more disturbing is that, as *troubling* as this is, it is not the only manipulation of the facts in the record where, without the twisting and turning of those facts, a reversal would have been required. For instance, the appeals court mis-characterized the circuit court's findings on a key issue of whether Clary Engel's claims, whether believed or not believed, could cause any damage to the case or to the Journal either way. Without pointing to the record, the appeals court concluded:

> "The circuit court did not accept Schultz's assertion that Engel was an unimportant witness, and, we believe, with good reason." [¶15].

This finding was not a distortion of the record, it a was complete fabrication of the record that the appellate court believed "with good reason." Judge Wasielewski *never* concluded that Engel was an important witness. In fact, Judge Wasielewski found the exact opposite and determined that Engel's claims did not and could not cause harm or prejudice to the Journal or to the case because, even if Engel would have been proffered as a witness, he would have been an unimportant witness being that Ms. Schultz "did not intend to rely on Mr. Engel" as a witness. [A-AP:142] Furthermore, Ms. Schultz clearly advised the court of appeals that Judge Wasielewski's finding of Engel's unimportance, as a witness, was a reason that the court also found there were no actual

losses sustained and that "no actual prejudice occurred." The court of appeals certainly should have known that it was Engel's unimportance as a witness, if he would have ever been proffered as one, that prompted Judge Wasielewski to conclude that the absence of damages would "not lie as a defense" because Ms. Schultz was being "penalized" to "deter future misconduct" for "conduct which goes to the heart of our system" [A-AP:150-151].

Similar factual distortions were repeated *twelve times* throughout the published opinions in this case ironically whenever the true facts mandated reversal.

In one instance, the appellate court recognizes that Judge Wasielewski's use of his "inherent powers" required that he conduct a lesser sanction analysis in order to show that he used his "inherent authority" with "restraint." However, without pointing to the record, the appeals court then disingenuously says that Judge Wasielewski engaged in such an analysis, when, in fact, he did not:

> "There are options other than dismissal available to circuit courts imposing sanctions on parties engaging in fraudulent behavior. Because dismissal is an "extremely drastic penalty," Hudson, 194 Wis. 2d at 542, circuit courts must use their authority with restraint and should consider whether there are less severe sanctions that would adequately deter and punish the misconduct. In this case, Schultz and ALI suggest that instead of dismissing the case, the circuit court could have prohibited Engel from calling Engel as a witness. This suggestion is unrealistic, however, because it is almost certain that Schultz herself would have decided not to call Engel, as it was Engel who provided testimony that Schultz had asked him to lie. In short, because the finding of misconduct consisted of attempted subornation of perjury, we cannot conclude

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> that the circuit court exercised its discretion erroneously by determining that other sanctions would be inadequate."[¶19]

Most *troubling* in this appellate court conclusion, that fabricated a trial court lesser sanctions analysis, is the intentional truncating of Ms. Schultz's argument in order to make her argument appear "unrealistic." Ms. Schultz's argument was:

> "Following an evidentiary hearing, the court could have prohibited plaintiff from calling Engel as a witness in the jury trial. Or, the court could have allowed defendants to put Mr. Engel and his claims in front of a jury."[pg. 17, C. Schultz appeals court brief]

Yet, that's not what the court of appeals quoted in their published opinion. The court of appeals took, out of context, the first sentence of her two sentence statement, labeled it "unrealistic" and injected it into their published opinion as if it were the only suggestion able to made by Ms. Schultz.

These are just three examples of over twelve blatantly dishonest statements of the facts in the record and gross distortions of the plaintiffs' pleadings that appear in the court of appeals published opinion. Clearly, the court of appeals opinion, in itself, proves that outside prejudices motivated the judges deciding this appeal.

VI. Justice Must Satisfy the Appearance of Justice.

Although §757.19(2)(3) Wis. Stat. sets standards under which a Wisconsin judge is required to disqualify himself or herself, the Due Process Clause of the 14th Amendment establishes a constitutional floor that requires a fair hearing in a fair tribunal before a judge with no actual bias. In *Offutt v. United States*, 348 U.S. 11, 14 (1954), the U. S. Supreme Court held that "justice must satisfy the appearance of justice" in order to satisfy the Due Process Clause of the 14th Amendment.

Even in cases, where damage awards for contempt are reviewed, the "review is not perfunctory" where "a district court's imposition of sanctions under its inherent power is involved." *Crowe v. Smith, 151 F. 3d 217, 226 (5th Cir. 1998)*

In the instant case, where the trial judge relied on his "inherent powers" as the sole authority for levying drastic and severe penalties, the review was less than perfunctory in that it contained multiple factual errors that were not corrected even after the court of appeals was made aware of them when the petition for review in this court was provided to them in order for them to reconsider their decision.

Similarly, in this court, the petitions for review of the appellate court opinion contained matters of first impression involving multiple constitutional issues in this case and in the John Schultz garnishment case. The fact that this court chose not to review the appellate court decisions, resulting in two error laden published opinions that are already raising havoc in Wisconsin's trial courts, has raised more than just a few sets of eye brows.

Furthermore, there is simply no reason that the appellate process in these cases could not have been beyond reproach thus satisfying the appearance of justice.

In this court, Charlie Sykes' wife, Justice Diane Sykes and Justice Pat Crooks, immediately disqualified themselves. If Justice Abrahamson and Justice Bradley would have done likewise, there would have been three justices available to review the cases. Likewise, if the same rules for accepting petitions apply here as they do in cases where all seven justices are involved in the deciding whether to accept a petition, there would have been one justice available, as the minority, to decide whether to review the appellate court opinion in this case.

In the appellate court, there are sixteen appellate court judges. Ten of those judges have never been in a situation

where Ms. Schultz has either run a campaign against or for them or had any personal contact with them or their close relatives. Not surprisingly, nine out of those ten judges, were not interviewed by or quoted in the Journal Sentinel *for anything* during this entire appellate process in this case. In fact, out of all of Wisconsin's appellate court judges, only one judge was interviewed by the Journal Sentinel in and around the time this case was being decided - Judge Charles Dykman, the author of the opinion in this case.

Therefore, after Dennis Moran would have sent out a correction to his memorandum, containing false and prejudicial information, this case could have been reviewed by judges who had no prejudices instead of two 1st District judges, who, for some secret and unexplainable reason, had to disqualify themselves mid way through the appeal after making three major decisions, one judge who was the sister of a political foe of Ms. Schultz and one judge who was the only judge, on the appellate court, promoting himself for Wisconsin Supreme Court by conducting interviews with the defendant in this case.

VII The public confidence in the judiciary is undermined when money, power and politics replace justice and the rule of law.

In a recent motion of this type, this court found that "motions such as this," have "the potential to undermine the public's trust and confidence in the legitimacy of this court's decision and the integrity and impartiality of this court as an institution..." *2002 WI 14, Case No. 97-0270, Jackson v. Benson, 213 Wis. 2d 1, (1997)*.

Ms. Schultz respectfully disagrees that a motion "such as this" has any potential to ever undermine the public's trust and confidence in the judiciary. It is when motions "such as this" are not brought, out of fear of arbitrary judicial reprisal, protected by a positive spin on that reprisal in the press reports of a powerful media defendant, that the court's "integrity" suffers.

Moreover, two respected recent national surveys, conducted by *Greenberg Quinlan Rosner Research* and *American Viewpoint* for the *Justice at Stake Campaign*, clearly demonstrate that the "integrity" of the judicial system, as a whole, is in doubt for an entirely different reason that supports "motions such as this." In fact, those national surveys indicate that an overwhelming number of Americans believe that "there are two systems of justice in the U.S. - for the rich and powerful and one for everyone else" and that "individuals or groups who give money to judicial candidates often get favorable treatment." [Ex:G]

Similarly, the citizens and litigants, in Wisconsin, are not naive. They recognize the power that the press has over our courts in Milwaukee and Madison. That is why this case, between Wisconsin's most powerful media concern and a controversial political operative, should have had a judge, who followed the rule of law, and an appellate process free from spin and any appearance of injustice or bias. It didn't. And *that* seriously undermines the integrity of the entire judicial system.

It is mind boggling that Judge Dykman thought it was appropriate to communicate with Journal Sentinel reporters or their lawyers on his candidacy for Wisconsin Supreme Court or on *anything else* when this case was in the appellate court. It is even more absurd that Judge Vergeront thought that she did not have to disclose that she had a brother who was obviously embittered by a very public and acrimonious altercation with Ms. Schultz. And this puzzling game of musical chairs, played with appellate court judges in the middle of this appeal, well.....what more can be said?

The appellants in this case are not the only litigants, who have come up against these same media defendants only to find that Wisconsin courts bestow upon them a "special status" whereby their opponents find themselves being deprived of established legal procedures and constitutional rights in favor of these powerful media adversaries. Recently, the Wisconsin Ethics Board asked Circuit Court Judge John

Albert to step down citing bias in a case where the Journal Sentinel is the plaintiff. Unlike this case, Judge Albert recognized the existence of the problem and corrected it. [Ex:I]

VIII. This motion is not frivolous

Ms. Schultz notes that, in a recent motion "such as this" made in *2002 WI 14*, *Case No. 97-0270, Jackson v. Benson, 213 Wis. 2d 1, (1997)*, this court found the motion to be frivolous and awarded fees to the opposing litigant. This motion is far from frivolous. However, even if this court thinks it may be, it would be a waste of judicial resources and time to embark on a frivolous analysis when Judge Wasielewski has already awarded fees for this motion in the trial court[A-AP-154] to "penalize" Ms. Schultz for filing this motion and to "deter" her from doing so. [A-AP-150]

Conclusion

For all of the above reasons, Ms. Schultz asks that Justice Abrahamson and Justice Bradley disqualify themselves from deciding this motion, that the Wisconsin Supreme Court reconsider their decision to not review this case and that a minority of one judge out of the remaining three make that decision to coincide with the three judge minority rule when seven justices decide, that this court vacate the court of appeals decision and send this case to a panel of three judges who have no political ax to grind and that those judges receive a corrective memorandum making right the false statements in the 1993 Dennis Moran memorandum.

s/Cynthia A. Schultz
Cynthia A. Schultz, *pro se*

Cynthia A. Schultz
11548 River Rd.
Mequon, Wis. 53092

March 18, 2002

SUPREME COURT
STATE OF WISCONSIN

In re the Matter of CYNTHIA A. SCHULTZ and the THE ANIMAL LOBBY, INC., Plaintiffs v. **CHARLES J. SYKES, JOURNAL BROADCAST GROUP, INC.** and **JOURNAL SENTINEL, INC.,** Defendants:

The Journal Sentinel, Inc.,

Creditor-Respondent,

v.

Case No. 00-2592

John R. Schultz, husband of Cynthia A. Schultz,

Debtor-Appellant,

The Journal Sentinel, Inc.
Creditor-Respondent,

Wisconsin Housing and Economic Development Authority,
Garnishee.

MOTION FOR SANCTIONS UNDER §802.05 STAT.

John R. Schultz, acting pro se, moves the supreme court to sanction the Journal and Sykes under §802.05 Wis. Stat. for proffering false and fraudulent pleadings to this court.

I. THE JOURNAL AND SYKES SHOULD BE SANCTIONED BECAUSE THEY MISLED THIS COURT ABOUT FACTS IN THE UNDERLYING CASE.

In their response to the petition for review of the underlying case to this garnishment action, the Journal and Sykes committed multiple frauds on this court by proffering false pleadings to the court. The following false statements of fact attempted to mislead this court into believing that sanctions, imposed under the "inherent power" of the court in the underlying case, are remedial and civil in nature rather than punitive and criminal in nature:

> "In material contrast, these sanctions were measured by the attorneys fees respondents incurred to protect themselves against Ms. Schultz's misconduct, and were payable to them. For that reason, these were remedial sanctions." [Pg. 3, response to C. Schultz petition]

> "Here, Judge Wasielewski did just what Gompers and Falstaff Brewing required: he measured the harm (in the form of attorneys fees) that Ms. Schultz's misconduct caused respondents, and imposed a remedial sanction payable to respondents." [pg. 8, response to C. Schultz petition]

> "The remedial award in *Hanshaw* is indistinguishable from the monetary sanction here. Both were measured by the adverse party's litigation costs and both were intended to reimburse the expenses that resulted from the misconduct." [Pg. 4, response to C. Schultz petition]

> "On the contrary, it cost respondents some $155,000.00 to frustrate her attempted subornation of perjury. Judge Wasielewski exercised his discretion soundly in requiring petitioners to reimburse those expenditures." [Pg. 10, response to C. Schultz petition]

> "While Judge Wasielewski thought petitioners deserved to be punished (see Schultz Pet. At 29), the sanctions he imposed were primarily compensatory. Respondents asked for fees to compensate them for the costs they incurred as a result of the petitioner's misconduct. Judge Wasielewski held an evidentiary hearing on fees, and ultimately calibrated his award to respondents' costs in proving petitioners' misconduct. Those are the marks of compensatory awards. See Hanshaw Enterprises, 244 F.3d at 1142; see also Gompers, 221 U.S. at 404, and Falstaff Brewing, 702 F. 2d at 779. Judge Wasielewski's award was not constitutionally excessive, and petitioners had all the due process they were entitled to." [pg. 13, response to C. Schultz petition]

All of the above statements of fact, in the Journal's and Sykes' response brief, are false. Furthermore, the Journal and Sykes knew these statements were false, when they proffered them to this court, because they knew that the alleged attempted subornation of perjury, in the underlying case, did not harm the Journal, Sykes or the case and that the sanctions were not calibrated to damages.

As outlined above, the Journal proffered to this court that "....it cost respondents some $155,000.00 to *frustrate* her (Ms. Schultz) attempted subornation of perjury." [Pg. 10, response to C. Schultz petition], that "....these sanctions were *measured* by the attorneys fees respondents incurred to protect themselves against Ms. Schultz's misconduct..,"[Pg. 3, response to C. Schultz petition], that "he (Judge Wasielewski) measured the *harm* (in the form of attorneys fees) that Ms. Schultz's misconduct caused respondents, and imposed a remedial sanction payable to respondents," [pg. 8, response to C. Schultz petition] and that Judge Wasielewski "*calibrated* his

award to respondents' costs in proving petitioners' misconduct." [Page 13, response to C. Schultz petition].

The above Journal statements were not only false but the Journal's own sworn *testimony*, in court proceedings in the underlying case, prove that the Journal knew these statements were false when they proffered them to this court.

In court proceedings in the underlying case, a Journal lawyer testified that the monetary sanctions were the result of the inordinate amount of time spent pursuing the punitive sanction of dismissal for their client and not on "frustrating" Ms. Schultz's alleged attempted subornation of perjury:

> HUSTON: In the respect that we had attempted to win summary judgment and in this case had not succeeded as to two of the claims. There was a risk that those claims would go to a jury. Defamation lawyers don't like juries. There is a risk that messages will have been misquoted in the newspaper five years ago or something of that sort. It is the pattern nationwide that many defamation cases that go to juries wind up with large verdicts, most of which are reversed on appeal, but we didn't want to go that way. When Mr. Engel came forward with his report that Ms. Schultz had attempted to suborn his perjury, it presented us with a good opportunity to avoid a jury so it was very important. [210:24-25]

This same Journal lawyer testified that he chose not to refer Engel, the person claiming to have had his perjury suborned, to the proper independent authorities but to instead spend close to $100,000.00 to obtain the punitive sanction of dismissal because it was beneficial to and *not harmful* to his client:

> HUSTON: I did not believe that to report it to the police or the District Attorney at the time was in the best interest of my client. I felt that eventually it might very well be the right thing to do and that *no harm* would be done by the delay, but that my clients' interest were best served by my doing what we did. [210:52]

Another Journal lawyer acknowledged the fact that the sanction, in the underlying case, did not cause *injury* to their clients and that the sanction was a *penalty* or a fine.

> BARGREN: Well, I would not classify this as a tort. Again, I understand that we're probably in new waters here, but this is, this is in front of the court, and I don't think that's a tort, that causes injury to another person, another private person. This was a sanction levied by the court for Miss Schultz's conduct in the action. The court was in a sense the victim. I don't think the court can be the victim of a tort. This was a penalty or a fine. Really a sanction. And that's how Judge Wasielewski described it. He assessed the fees as a sanction to reflect what he saw was misconduct before the court. So for that reason I don't feel that it fell into an action as a tort, you know, it was a misconduct before the court. [R. 27:45]

Additionally, as the Journal and Sykes confirmed above, Judge Wasielewski concluded that there was no harm to the Journal, Sykes or the case:

> COURT: Whether or not the parties were prejudiced by what Clary Engel did, the fact that there was merely an attempt and therefore actually no actual prejudice occurred will not lie as a defense. It's conduct which goes to the heart of our system. [208:59-61]

> COURT: This case like the other two that I have cited here, the Johnson case and the Chevron case, provide for entry of a sanction under these circumstances without necessarily a showing of prejudice. It is not a condition precedent for a dismissal. [203:94]
>
> COURT: The Court noted in Garfoot that the destruction of evidence could be a fact to be considered, but you don't have to show that the other side was prejudiced by what happened. [203:94]

A Journal lawyer also told the trial court that $49,302.47,[3] of the $168,944.47 in monetary sanctions was what it cost the Journal and Sykes to get the $168,944.47 in monetary sanctions. Thus, the $49,302.47 could not have been construed as being money spent to "*frustrate*" Ms. Schultz's alleged attempt to suborn perjury:

> HUSTON: From January 21st forward, the only thing that we were doing in this case was to prosecute our motion for fees on one ground or another. So based on your Honor's reasoning a few minutes ago, I would ask that all of the fees from January 21st forwarded be included as an award. [208:65]

This last statement was even false when it was proffered to the *trial court* because, from January 21st forward, a significant portion of the $49,302.47 was for asset tracing, injunctions to freeze Ms. Schultz's assets in anticipation of the Journal judgement and for other work to collect the anticipated Journal judgement. These also were not activities that were

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[3]The amount of fees and non-statutory costs from January 21st until judgement

necessary to "frustrate" any alleged attempt to suborn perjury. [B-AP-996-999]

In addition to the above $49,302.47, the Journal knew that Judge Wasielewski did not *calibrate* any other portion of the punitive sanctions to the Journal's costs in "protecting themselves against Ms. Schultz's misconduct" [pg. 3, response to C. Schultz petition]. The following examples demonstrate that Judge Wasielewski made no effort to measure any of the $168,944.97 to damages because he concluded that measuring the fine to damages could cause Ms. Schultz to be "the one to profit:" [208:65-67].

$2772.50 was given to the Journal to pay them for discussing and making the following "settlement offer" to Ms. Schultz:

> "We are guardedly optimistic due to the tangled web comment (of Judge Wasielewski). We have a copy of that transcript. We will get a release of all claims and they will not be confidential. Neither party will admit liability. And we will print a correction to the dog killing article. Ms. Schultz will also give us a judgment against her in the amount of $175,000.00." [272]

Over $7,000.00 was paid to an expert witness to research and review two years worth (the entire case) of Journal attorney billings. This expert was hired by the Journal in anticipation that they were going to get $470,000.00 for litigating the entire case. [210:80, 83]

Costs of $13,147.00 were awarded to the Journal and Sykes to litigate the *entire non-frivolous case*. This amount, not calibrated to damages, was awarded under Judge Wasielewski's "inherent powers," as punishment when, under

his "inherent powers," he dismissed the case as punishment.

The above are only a few examples of how Judge Wasielewski did not even make an attempt to measure the $168,949.97 fine to damages when he piled the punitive fine on to the drastic sanction of dismissal that had already unjustly rewarded the Journal with a huge windfall that was well over and above the non-existent damages.

II. THE JOURNAL AND SYKES KNEW THEY WERE MISLEADING THIS COURT WHEN THEY TOLD THE COURT THAT MS. SCHULTZ HAD NOT APPEALED PORTIONS OF THE SANCTIONS IN THE UNDERLYING CASE.

Apparently recognizing that the $13,147.00, in statutory costs, cannot possibly pass constitutional muster because that amount cannot possibly be *calibrated to damages*, the Journal stepped up their fraud on this court by claiming that Ms. Schultz did not appeal this portion of the $168,944.97 sanction.

In the following false statement to this court, the Journal and Sykes first peeled away the $13,147.00 in statutory costs, assessed as punishment against Ms. Schultz when the case was dismissed as a punishment, from the total punitive sanction of $168,944.97 and then deceived this court by saying that Ms. Schultz did not appeal the $13,147.00 portion of the punitive sanctions. The Journal and Sykes told this court:

> "Here, petitioners disingenuously use a larger number: $168,944.97. That is the amount of the judgment, but includes $13,147.00 in statutory costs that petitioners have not appealed." [pg. 9, response to C. Schultz petition]

The above statement proffered to this court was false. First, Ms. Schultz did appeal the $13,147.00 in statutory costs

when, in her brief to the court of appeals, she said:

> "Plaintiff appeals from the dismissal of the case *and statutory costs*, the award of fees and non-statutory costs, the first summary judgment dismissing 78 instances of libel, the order that plaintiff is a limited purpose public figure, and, if it is binding, *the court's oral dicta that fees would continue through all appeals*."[pg. 3, C. Schultz court of appeals brief].

Second, as a part of the $168,944.97, the $13,147.00 amount was thoroughly briefed when briefing the $168,944.97 monetary sanction. Thus the Journal and Sykes intentionally misled this court when they said that Ms. Schultz had not appealed this $13,147.00 portion of the punitive sanction.

The Journal and Sykes, used this same *peel away* ruse, when they made the following false statement to this court:

> "Judge Wasielewski ordered petitioners to compensate respondents for their legal fees on appeal." Petitioners did not object in the Court of Appeals to this award-in-advance of the fees respondents would incur in defending against their appeal. Therefore, they waived their right to seek review here." [pg. 15, response to C. Schultz petition]

The record clearly shows that Ms. Schultz did object to Judge Wasielewski's "in-advance" sanction, as shown above, and appealed that portion of the sanction in the court of

appeals. [page 3, C. Schultz appeals brief][4]

Again, however, the Journal peeled away this portion of Judge Wasielewski's monetary sanction that made the $168,944.97 into an unlimited fine that escalates for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken." Then, after peeling away this portion of the sanction, that cannot be explained as anything other than punishment for Ms. Schultz's refusal to succumb to judicial intimidation, the Journal and Sykes misled this court when they told this court that Ms. Schultz did not object to that portion of the monetary sanction.

III. THE JOURNAL FRAUDS WERE MATERIAL TO THE 14th AMENDMENT ISSUES ON WHICH A REVIEW HAS BEEN REQUESTED AND THEIR ENTIRE APPEAL IS FRIVOLOUS WITHOUT THEIR FRAUDS ON THIS COURT.

The Journal and Sykes have built their entire appeal on false statements to this court and to the court of appeals. Their false claims were designed to throw a smoke screen around Judge Wasielewski's and the appellate court's clear denominations of and references to the sanctions, in the underlying case, being punishment which, in themselves, are enough to prove the unconstitutionality and criminal nature of the proceeding in the underlying case.

It is only with these frauds that the Journal and Sykes could obscure the fact that Judge Wasielewski and the court of appeals made the same mistake as the Virginia State Supreme Court made in *Bagwell* when they concluded that

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[4] It's astounding that, with all of these punitive sanctions piled on to the sanction of dismissal, the appeals court couldn't identify a "less severe sanction" than the draconian sanction of dismissal. [¶19]

circuit courts can, without criminal procedural due process, impose severe punishment to *"maintain their dignity."* [¶2].

In *Bagwell*, 512 U.S. at 847, Justice Ginsburg, joined by Chief Justice Rehnquist in her concurrence, noted that, since the Virginia Supreme Court's recognition of the fines were to uphold the dignity of the law and public respect for the judiciary, it was enough to indicate that the sanctions in Bagwell were punitive and criminal in nature.

Likewise, the Journal's false representations were contrived to obliterate the fact that Judge Wasielewski and the appeals court, in the underlying case, made the same mistake the District Court in *Falstaff v. Miller Brewing*, 702 F.2d 770, 780 (1983) made when they concluded that the trial court could impose severe sanctions, without criminal procedural due process, "both to penalize the offender and also deter future misconduct."[203:92][¶7]

The Seventh Circuit, in *Simpson v. Sheahan, 104 F. 3d 998 (1997)*, said it most clearly. In *Simpson*, where a judge correctly applied the three-part test to award fees for *damages* in a §1988 case, the Seventh Circuit vacated the award of attorney fees when it concluded that it was *not harmless error* for the District Court to denominate the award a sanction. "Denominating an award of attorney's fees a 'sanction' is *not* harmless error; it is an abuse of the district court's discretion." *Simpson at 1002* While *Simpson* is a civil rights case, it nonetheless demonstrates the seriousness of a court's delineation of an award to a private party as being punishment.

The courts in this case have clearly delineated the sanctions as punitive. Because of that, the Journal and Sykes proffered false pleadings to this court to make this court believe that the sanctions in this case were calibrated to damages.

IV. THE JOURNAL AND SYKES COMPOUNDED THEIR FRAUD UPON THE COURT BY MISREPRESENTING CASE LAW.

The Journal told this court that the "remedial award in *F. J. Hanshaw Enter. V. Emerald River Dev., 244 F.3d 1128 (9th Cir. 2001)* is *indistinguishable* from the monetary sanction here" [pg. 4, response to C. Schultz petition] and that, "like Judge Wasielewski here, the court held an evidentiary hearing and, after hearing clear and convincing evidence, ruled that there had been a bribe attempt."[pg. 3, response to C. Schultz petition]

This is also not true. The remedial sanction in *Hanshaw* is clearly distinguishable from the monetary sanction in the instant defamation case.

In *Hanshaw*, Fred Hanshaw, who misbehaved in the presence of the court, disobeyed a court order and allegedly attempted to bribe a *court official*, did not challenge the amount of the $200,000.00 remedial sanction or the court's power to impose it.[5] Thus, the 9th Circuit, had to conclude that the $200,000.00, awarded to compensate Fred's brother (the other litigant) for expenses relating to the six months delay in allocating millions of dollars between Fred and his brother, was accurately calibrated to damages. This was in spite of the fact that the 9th Circuit over turned a $500,000.00 sanction that it determined could not be calibrated to damages and that was

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[5] Section 401, limiting the inherent powers of U.S. courts, provides: A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as-(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command

payable to the court.

In contrast, Ms. Schultz has consistently challenged the amount of the monetary sanctions as not being calibrated to damages and has challenged the trial court's power to impose the sanctions being that Ms. Schultz *did not misbehave in the presence of the court*, *did not disobey a court order* and *did not commit a fraud on the court by bribing a court official*. In fact, the person, who claimed to have his perjury suborned in the underlying case, was not even proffered to the court as a witness much less was he a court official as in *Hanshaw*.

In *Hanshaw*, after the 9th Circuit reversed the $500,000.00 punitive sanction, the unchallenged $200,000.00 compensatory sanction was the only sanction against a party with $54,000,000.00 in assets.

In the underlying case, the escalating monetary sanction of $168,944.97 (which could now be well over $300,000.00) was piled on to the severe and drastic punitive sanction of dismissal of a valid cause of action against a party with little or no wealth.[6]

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[6]Ms. Schultz attempted to have the court consider her personal financial condition. She supplied the court with an expert report that was based on financial information that the Animal Lobby and Ms. Schultz supplied to an accountant. The court refused to hear the testimony on the financial information or to allow it into evidence [212:77-82] even though Ms. Schultz tried to explain that, while she could not testify to the expert's conclusions, she was competent to testify to the accuracy of the financial information contained in her expert's reports that relied on her own and the Animal Lobby's tax returns and financial data and on which she had personal information contained in her expert's reports that relied on her own and the Animal Lobby's tax returns and financial data and on which she had personal knowledge [212:79-83]. As they did throughout their opinion, the appeals court relied on authority for evidentiary matters in *trials*, not in evidentiary hearings, and ignored page 25 of the Animal Lobby brief and the transcript of the testimony [212:79-83] when it erroneously concluded that Ms. Schultz was not familiar with the documents and, thus, could not testify to the financial data in the

The bottom line is that, if Fred Hanshaw would have challenged the $200,000.00 sanction as not being calibrated to damages, the Ninth Circuit would have had to over turn the $200,000.00 sanction unless actual losses could be proven.

The Journal and Sykes made the same false claims about *Mackler Productions, Inc. v. Frank V. Cohen, 146 F. 3d 126 (2d Cir. 1998)* and *Mackler Productions Inc. v. Cohen*, 225 F.3d 136, 143 (2d Cir. 2000) when they told this court that the *Mackler* Courts held that the safeguards of criminal procedures are not required when a court imposes compensatory sanctions.

That is not what either *Mackler* Courts held. In *Mackler Prods. v. Cohen*, 146 F.3d 126 (2d Cir. 1998), the trial court suspected that lawyer Cohen had suborned the perjury of a key witness. The judge followed established legal procedures by deciding the case on the merits and, after trial, referring the matter of perjury to the U. S. Attorney. The witness, who gave the perjured testimony at trial, pled guilty to perjury.

After that guilt was established through the proper criminal channels, the civil trial court conducted a hearing and imposed sanctions on lawyer Cohen.[7] The trial court punished

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report.[¶52]

[7]Judge Wasielewski was not ignorant of these procedures. At the very same time, Judge Wasielewski was punishing Ms. Schultz, he was punishing another litigant in the Milwaukee circuit court case of *Mark Ward v. Hollywood Casino Corp. et al*, 99-CV-000359 (1999). In that case, Judge Wasielewski conducted a hearing on March 27, 2000to entertain a Motion to Dismiss for Mr. Ward's perjury in a deposition where he testified to his name being something other than it was. In that case, where the most powerful media outlet in the State of Wisconsin was not seeking to take away valid claims and where there was no radio talk show personality to give favorable reviews to his decisions, Judge Wasielewski did not stop the jury trial to conduct a criminal bench trial, hand over valid claims to Hollywood Casino, impose a bankrupting sanction, and award

Cohen with a $10,000.00 fine, made payable to the court and imposed a $45,000.00 sanction made payable to the opposing litigant. The 2nd Circuit, relying on *Bagwell*, remanded the imposition of the $10,000.00 fine, not able to be calibrated to damages, back to the district court to implement procedural protections appropriate to a criminal proceeding and remanded the $45,000.00 award of attorney fees to the district court to determine whether the $45,000.00 was the result of actual damages. When the trial court, on remand, decreased the fine to $2000.00, did not apply procedural protections appropriate to a criminal case and did not determine if the $45,000.00 was to reimburse for *damages sustained*, the 2nd Circuit Court of Appeals, in *Mackler Productions Inc. v. Cohen*, 225 F.3d 136, 143 (2d Cir. 2000), used its supervisory powers over the administration of justice and the federal courts within the 2nd Circuit to reverse the lesser $2000.00 punitive sanction and again remanded the $45,000.00 back to the trial court to determine if the $45,000.00 amount, payable to the opposing litigant, was the result of actual damages sustained by the alleged subornation of perjury.[8] In the latest episode of the *Mackler* saga, a new District Judge, in *Mackler Productions, Inc. v. Turtle Bay Apparel Corp., No. 92 Civ 5745 D.C., 2001 WL 892815 (August 6, 2001)*, conducted a hearing to determine if there were damages resulting from the perjury that was suborned and given at trial. The District Court concluded that, *because*

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fees for "as long as this issue is alive, until there is a final judgment entered from which no appeal is taken." Instead, under his "inherent powers," he delayed deciding the amount of the sanction until after the jury trial and awarded Hollywood Casino their fees and costs necessary to verify the real name of Mark Ward. At the close of the jury trial, Mr. Ward was sanctioned $3,342.63 that was calibrated to damages.

[8] Ignoring the *Mackler* findings that the $45,000.00 sanction had to be calibrated to damages and could not simply be awarded for the benefit of the opposing litigant, the court of appeals, in the instant case, concluded that *Mackler* was "inapposite" because, the $10,000.00 fine was made payable to the court.¶51

the entire case hinged on the suborned perjury, that was given at trial, the plaintiff was harmed by the perjury suborned by Cohen. The District Court also concluded that, because the case would most likely have never gone to trial without the perjured testimony, attorney Cohen multiplied the proceedings by $46,750.00.[9]

In the underlying case, the *exact opposite* occurred. First, Judge Wasielewski didn't refer the Journal accusations of attempted subornation of perjury to the District Attorney or to an independent prosecutor. Second, he stopped the civil jury trial to conduct criminal proceedings on the perjury allegations. Third, he dismissed the case as punishment. Fourth, after concluding that there was no harm to the Journal's case and that the claims did not hinge on Engel's testimony, he levied a punitive sanction of over $168,000.00 that was not calibrated to damages.

VI. THE JOURNAL AND SYKES HAVE SHOWN A PATTERN OF FRAUD ON THE COURT.

A. The Journal and Sykes misled this court about sanctions imposed for conduct outside of Judge Wasielewski's jurisdiction.

The Journal and Sykes represented to this court, that Judge Wasielewski did not sanction for conduct outside of the underlying litigation. They told this court that "Judge Wasielewski saw the pattern in Ms. Schultz's disdain for the judicial system, but based the sanctions on her similar but independent misconduct in this case."[pg. 6, response to C.

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[9] A district court can punish contempt of its authority, including disobedience of its process, by fine or imprisonment, 18 U.S.C. § 401; award costs, expenses, and attorney's fees against attorneys who multiply proceedings vexatiously, 28 U.S.C. § 1927.

Schultz petition]

This statement is false. Almost the entire criminal proceeding, in the underlying civil case, was devoted to establishing Ms. Schultz's guilt in a dismissed criminal dognapping case and to an alleged attempt to suborn perjury within that criminal dognapping case.

In fact, Judge Wasielewski made it clear that he would have imposed a lesser punishment if Ms. Schultz would have pled that the documents, she drafted for her attorneys *in the criminal dognapping case*, were really to suborn the perjury of Engel in *that* criminal dognapping case:

> Court: Going on the basis of her testimony at the hearing, her testimony at the hearing was defiant. She said no. She denied it defiantly. She said her documents 15, 16 and 17 were merely her recording of answers given to her by Mr. Engel in response to questions that she asked. She denied that this was any kind of a script for perjured testimony. So in the face of that, your analogy, sure are there cheaper ways to do things? Yes if you have got an adversary who admits what it is you are trying to prove. It is always easier to come in on a stipulation and get an order. You are implying that the plaintiff is willing to stipulate to this, but I don't see that willingness evidenced anywhere in this record. [210:42]

Furthermore, the court of appeals, operating under the unprecedented and ill-conceived notion that a trial court judge, in a civil defamation case, has jurisdiction to investigate and punish misconduct in a separate criminal case, recognized that Judge Wasielewski did impose sanctions for alleged misconduct in the criminal dognapping case and concluded

that Judge Wasielewski was justified in considering the alleged conduct in the criminal dognapping case in assessing sanctions because of the "high degree to which the behavior in both cases was tied together." [¶18] Then the appeals court relied on evidence, *exclusive* to the criminal dognapping case, to decide that Judge Wasielewski did not abuse his discretion. First, the document, that the appeals court quoted in their opinion and relied on to conclude that Judge Wasielewski did not abuse his discretion, was a document that Ms. Schultz gave to her lawyers in the 1996 criminal dognapping case.[¶ 41-42] Next, the appeals court relied on the testimony of June Ellen Jones and Barb Manson who the appeals court claimed contradicted Cindy Schultz's testimony about the dognapping. [¶43] June Ellen Jones and Barb Manson were never listed on anyone's temporary witness list in the underlying defamation case. More importantly, however, they only testified to what they knew about the dognapping in the criminal case which could only possibly prove that Ms. Schultz was involved in helping to hide out the stolen dogs – a fact that Ms. Schultz acknowledged at the outset of the underlying case.[10]

Thus, the Journal and Sykes misled this court when they told this court that Judge Wasielewski did not impose sanctions for conduct outside of his jurisdiction. The truth is that Judge Wasielewski not only imposed sanctions for conduct he concluded happened in another case but for a criminal dognapping that he thought might have happened but couldn't be proved. The appeals court, relying on evidence only attributable to the alleged misconduct in the criminal dognapping case, upheld Judge Wasielewski's ability to

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[10]Early in the underlying case, Ms. Schultz acknowledged her involvement in the dognapping when the Journal and Sykes used the same dognapping "guilt" issue to get claims dismissed through two identical summary judgement motions. Judge Foley recognized this during the first summary judgment hearing in September 1998: "She also acknowledged being involved in the post-theft relating of the dogs, if you will." [B-AP:1167-68].

impose those sanctions.

The record clearly proves that the Journal and Sykes misled this court when they told this court that Judge Wasielewski did not impose sanctions for conduct in another case.

B. Sykes and the Journal misled this court about Judge Wasielewski's findings that prevented him from finding any portion of the underlying case frivolous.

At footnote 6 on page 12 of the response brief, the Journal and Sykes engage in, what the court will see below, has become a Journal pattern of *footnote fraud*. The following footnote is a complete fabrication and is an attempt to perpetrate a fraud on this court:

> "Defendants asked the trial court to award *all* the costs of defending petitioners' claims, on the ground that claims that could not succeed without perjury were frivolous as a matter of law. Disagreeing about the law (but not the facts), Judge Wasielewski awarded only part of Petitioners' fees."[page 12, response to C. Schultz petition]

First, Judge Wasielewski *did* give the Journal and Sykes all of their statutory costs for the entire non-frivolous litigation. Second, Judge Wasielewski concluded that *none* of the case was frivolous after disagreeing with the Journal on the facts after making a factual finding that the claims, in the underlying case, *could* succeed without the alleged suborned perjury. [211:102, 208:51]

It was because NONE of the claims, in the underlying case, were reliant on any of the testimony allegedly attempted

to be suborned from Clary Engel that Judge Wasielewski could not find the case, or any portion of it, frivolous:

> COURT: As I recall the record here, there were a number of other persons on the plaintiff's witness list who were going to be coming in to give similar testimony to that. The plaintiff did not intend to rely on Mr. Engel for all of the reputational damage testimony. It was also going to come from others. [208:51]

Additionally, after days in a criminal proceeding, without any standards, no criminal procedural due process protections and with unlimited irrelevant hearsay testimony by witnesses, on whom the Journal spent tens of thousands of dollars coaching, Judge Wasielewski could still not conclude that Ms. Schultz was guilty of dognapping.[11]

> THE COURT: The suborned perjury here does not in the Court's view show that the plaintiff committed the dognapping. The guilt with respect to the dognapping does not in the Court's view necessarily follow from the fact of the attempted subornation of perjury. [208:51][12]

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[11]The appeals court ignored Ms. Schultz's main argument that the "evidentiary hearing" was really a criminal bench trial. However, the appeals court must have, themselves, thought that the proceeding was a criminal bench trial because they relied solely on criminal case law and rules of evidence statutes to determine that the trial court was correct on evidentiary matters that apply only in criminal *trials* but were used in a supposed "evidentiary hearing".¶28-31

[12]The appeals court said: "The circuit court did not accept Schultz's assertion that Engel was an unimportant witness, and, we believe with good reason." Since the record , in the circuit court, reflects the exact opposite, Mr. Schultz has no idea what the appeals court "believed" but, whatever it was, it couldn't have been with any reason much less a "good reason."

There is no wiggle room here. The Journal and Sykes perpetrated a fraud on this court when they told this court that Judge Wasielewski agreed that the claims could not succeed without the alleged suborned perjury but that, as a matter of law, he could not award fees under §814.025.

This was not the only instance of *footnote fraud* perpetrated on this court. The Journal and Sykes, at footnote 3, lied to this court when they told this court that:

> "Petitioners did not contend on appeal that the respondents' legal fees were unreasonable or excessive. Decision ¶ 52 n. 10. [page 10, response to C. Schultz petition]

In Ms. Schultz's appeal, the heading of a four page section concerning the unreasonableness and excessiveness of the sanctions reads:

> "THERE IS NO STATUTORY OR CASE AUTHORITY FOR THE FEE AWARD. THE AWARD WAS UNREASONABLE BECAUSE IT WAS AN EXCESSIVE FINE THAT WAS NOT CALIBRATED TO DEFENDANTS' DAMAGES." [page 9, Schultz appellate reply brief]

Thus, contrary to the Journal's proffer to this court, petitioners *did* contend, on appeal, that the respondents' legal fees were unreasonable and excessive.[13] Additionally, the

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[13]Even though this heading *alone* was enough to explain why Ms. Schultz believed the circuit court's determination was in error and Ms. Schultz and the Animal Lobby, Inc., both in their main and reply briefs, explained why they believed the circuit court's determination was in error, the court of appeals concluded that "Although Ms. Schultz states in her reply brief that she is challenging the award's reasonableness, she fails to explain why she believed the circuit court's determination was in error."

court of appeals recognized that Ms. Schultz *did contend* that the Journal's legal fees were unreasonable even though the appellate court did not understand that an award of fees cannot be tested for reasonableness, under Supreme Court Rule 20:1.5(a), unless the fees can be calibrated to damages.[14]

Nevertheless, the fact, that the appellate court couldn't comprehend that fact that serious punitive sanctions, not calibrated to damages, are unreasonable because they are criminal in nature and because, in the instant underlying case, violated the 8th Amendment's excessive fines clause, does not give license to the Journal and Sykes to further twist the appellate court's confusion into a lie and then perpetrate that lie on to this court.

C. JOURNAL'S FOOTNOTE FRAUD SUCCEEDED IN THE COURT OF APPEALS AND CONTINUES TO BE PERPETRATED ON TO THIS COURT.

In their brief to the court of appeals, the Journal in a footnote, proffered this false statement to the court of appeals:

> "Lack of statutory pre-suit demand by ALI is itself grounds for dismissal of ALI's claims against the newspaper." [pg. 32, court of appeals response brief]

The Animal Lobby, Inc.'s response [court of appeals

[¶52 n. 10]

[14]Applying the test for reasonableness under, SCR 20:15, to attorney fees not calibrated to damages is like saying that a plumber's bill to you, for work on the corner Citco's broken toilet, is reasonable because he was skilled, couldn't take another job, charged about the same as other plumbers in the area, did a good job in a short period of time, did work for you before and was experienced.

response: pg. 1-3] to the footnote was:

> "Although respondents argue that the Animal Lobby and Ms. Schultz were united in interest, they argue at footnote 5 that Animal Lobby should have sent Journal Sentinel, Inc. a separate request for retraction from that of Ms. Schultz. Even if that was a requirement for Animal Lobby in this case, defendants never before raised this issue. Therefore, they have waived an objection to the absence of any request for retraction that they now claim should have been made. Moreover, the statutes only require a request for retraction in the case of written publications, not in the case of radio broadcasts. §895.05(2), Stats. Much of the slander in this case stems from the radio broadcasts of Mr. Sykes. Thus, no request for retraction was necessary."

The court of appeals mis-characterized the above Animal Lobby response by implying that the Animal Lobby admitted in its brief that it "failed to give notice to the Journal."¶57 In addition to mis-characterizing the Animal Lobby's response, the appeals court either didn't read or didn't understand §895.05(2) because it dismissed the Animal Lobby's claim against the Journal Sentinel *again*[15] when it concluded that, because "the Journal denied in its Answer that ALI had demanded a retraction, nothing else needed to be done" to prove that the Animal Lobby, Inc. had not complied with §895.05(2).¶57

15The Animal Lobby's claims were already dismissed. However, the appeals court found that there was no reason for their dismissal and remanded them to the trial court to find one.

When the Journal perpetrated this footnote fraud on the court of appeals, the Journal knew that the Animal Lobby, Inc., pursuant to §895.05(2) Wis. Stat., sent more than one letter to the Journal making them aware of the libelous statements and giving them the information necessary for them to correct those statements. [A-AP:320-337]

Yet after their success in duping the appellate court, they brought their same fraud to this court by again claiming that the Animal Lobby, Inc. did not comply with §895.05(2).[pg. 18, response to C. Schultz petition]

The Journal/Sentinel is a media defendant who has been sued multiple times. Foley and Lardner has represented them in most of these cases. It is inconceivable that the Journal/Sentinel or Foley and Lardner do not know what constitutes legal notice under §895.05(2) and it is a fraud on this court for them to say to this court that *"you owe me a retraction"* is a requirement for providing notice of defamations to a media defendant.

Even more despicable is that, after succeeding at deceiving the court of appeals about the Animal Lobby, Inc.'s notice, the Journal had the audacity to argue to this court that *"this is not the sort of important question of law that merits this Court's attention."* [pg. 18, response to C. Schultz petition]

This fraud caused the court of appeals to take a valid cause of action, a propriety right, and give it to the Journal without any due process whatsoever after they determined that the same property right had been taken, once before, without reason. If this is not the sort of "important question" that "merits this Court's attention," what is?

While it is easy to understand why the Journal and Sykes would like this court to regard this question of fact as "unimportant," it is impossible to understand why the Journal

and Sykes were permitted to get away with this obvious fraud in the appeals court and why they think that they can get away with it now.

D. THE JOURNAL AND SYKES MISLED THIS COURT WHEN IT TOLD THIS COURT, THAT MS. SCHULTZ DID NOT "CHALLENGE THE AMOUNT OF THE SANCTION."

On page 4 of the Journal's response to C. Schultz's petition, the Journal, citing *Hanshaw*, again tells this court that Ms. Schultz does not challenge the amount of the sanction:

> "The wrongdoer in *Hanshaw* did not challenge the amount of the sanction. Neither do these petitioners. Decision ¶52 n. 10."

This is not true. Ms. Schultz, throughout her entire appeal, challenged the gross excessiveness of the monetary sanctions particularly because the monetary sanctions were not calibrated to damages and were piled on top of the punitive sanction of dismissal. Yet, the Journal and Sykes perpetrated this fraud on this court by exploiting the appellate court's obvious confusion over the legal tests required to determine "sustained losses" versus the tests required to determine whether the fees, that an attorney charges, are "reasonable." Nonetheless, the Journal, when proffering this false statement to this court knew that Ms. Schultz challenged the monetary sanctions as being grossly excessive and as not being calibrated to damages. The Journal and Sykes clearly attempted to mislead this court when they said that she did not.

E. THE JOURNAL AND SYKES ENTIRE MOTION TO DISMISS, IN THE TRIAL COURT, WAS SUPPORTED BY CLARY ENGEL'S KNOWINGLY FALSE TESTIMONY.

The Journal proffered an affidavit drafted by them and signed by Clary Engel to support their Motion to Dismiss.

The affidavit said that Engel did not tell Mr. Huston of his meeting with Cindy Schultz (one of the times that Judge Wasielewski found was to attempt to suborn Engel's perjury) because "he got to the offices of Foley and Lardner at 2:35 P.M., late for his deposition, and that he did not have the time to report the meeting to Mr. Huston. [98:95-96]

This affidavit testimony was a complete fabrication and Sykes and the Journal knew it was a fabrication before they proffered it to the trial court. The deposition, to which Engel refers, began at 2:40 P.M. and Engel admitted, under cross examination at the criminal proceeding, that he spent time, before that deposition, having coffee in the private office of Jim Huston.[198:131-132] After the criminal proceeding, Huston admitted, under oath, that Engel was drinking coffee in his office before the deposition thus proving that Engel did have the time to "report the meeting" before the deposition.[211:15]

This was not the only problem with the perjured Engel affidavit that was "central" to the Journal Motion to Dismiss. It came out, in Journal billing records, that Engel did not sign this one but two similar affidavits for the Journal. [B-AP:974-979] In his first affidavit, drafted on September 13th, Engel testified that Ms. Schultz had *called him*, on the morning of his deposition, to suborn his perjury. On September 27th, the Journal received telephone records from Ms. Schultz through discovery that proved that Ms. Schultz did not call Engel and that Engel had not only called her that morning but had tried

to reach her several times on the night before the deposition and after a meeting with Jim Huston, the Journal lawyer. [216: ex:101-02,05,06,07,08,10] On September 27th and 28th, the Journal lawyers made multiple calls to Engel. [216:ex:101,02,05,06,07,08,10] On September 29th , the Journal delivered a new affidavit to Engel. This time, the new affidavit edited out that very important perjured testimony saying that Ms. Schultz had called a reluctant Clary Engel to suborn his perjury and replaced it with: "Cindy Schultz asked me in a telephone call to meet her in the parking lot."

After the case was dismissed and after the Journal billing records were produced showing the multiple affidavits, Engel was asked about the number of times he had to sign that Journal affidavit. First he testified that he was only asked to sign one affidavit right after his September 3rd deposition at Foley and Lardner. [A-AP:496] Later, Engel was asked if he signed an affidavit that was sent to him on September 29th, Engel admitted that he had. After admitting to signing that second affidavit, however, Engel was no longer sure if he did sign "something" on the day of his September 3rd deposition. [A-AP:503-04] When the Journal lawyer was asked, how many affidavits the Journal drafted for Engel's signature, the lawyer testified that he did not know and that, other than Clary Engel, he didn't know who would know. [211:20]

There is no disputing that Engel lied in not one but two affidavits and that the Journal and Sykes knew that he lied when they proffered one of those affidavits to the court in support to their Motion to Dismiss and when they concealed, from the court, that Engel had attempted a fraud on the court in yet another discarded affidavit.[16]

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[16]The Journal never disputed this issue raised on page 13 of C. Schultz's appeals court main brief.

In addition to Engel's affidavit, the Journal proffered a videotaped deposition of Clary Engel in support of their Motion to Dismiss. After being prepared by a Journal lawyer for several hours [B-AP:972],[17] Engel gave the following testimony under oath:

HUSTON:

Q. Okay. Between the time that you received our subpoena, Exhibit 281, and say, a couple of days before the deposition, did you talk with anybody else about what was going on and about what Ms. Schultz was asking you to do?

A. Yes

Q. Okay. Who else did you talk to?

A. I talked to a number of people – my fiancé, my brother out in Arizona, my sister here, and another attorney.

Q. Okay. Now, I want to move forward to August 24, 1999. That's the afternoon before you were scheduled to give a deposition on August 25th.

A. Yes.

Q. Did you come to my office?

A. Yes.

Q. Up to that moment had you ever spoken with me before?

A. No.

Q. And up to that moment had you ever spoken with anybody associated with this law firm?

A. No.

Q. Up to that moment had you ever spoken with anybody who was involved in defending this – this case?

A. No. [130:ex.8]

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[17]Engel denied, during his testimony in the criminal proceeding, that he was prepared on the day before his deposition. [A-AP:413]

These carefully worded questions, by a Journal lawyer, permitted Engel to conceal his calls to the Journal and Sykes to ask them for money on *the day before* the first scheduled deposition. Later, however, Engel was forced to lie to Ms. Schultz's lawyer to cover up those calls.

EHLINGER:

Q. Other than Mr. Huston and Mr. Wall and your sister and your brother and me and Mr. Huston, have you ever talked to anybody else about Cindy Schultz? And Mr. - Mr. Hooper, I suppose.

Mr. Huston: I object to the form of that question. It's - It's not a clear question.

Q. Who have you talked to about Cindy Schultz other than the people that have been mentioned here today?

A. I - I may have brought her up to neighbors, and so forth. I don't know. I - It comes up once in a while. I'm pretty sure that my mom, I talked to her about it. That's about it. I talked to Cindy Schultz many times about this. [A-AP:544-545]

The Journal obviously knew that Engel had called them to get money when Engel gave this response to Ms. Schultz's lawyer. Yet, with the exception of a Journal objection to disrupt the question, that clearly put Engel in the spot of having to admit to his attempts to get money from the Journal, the Journal sat silent while Engel lied to conceal his calls to the Journal and Sykes for money.[18] Then, the Journal and Sykes submitted that perjured testimony to the trial court as evidence

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[18] A Journal lawyer later testified that he did not know about the requests for money in spite of the fact that, immediately after Engel called both Sykes and the Journal for money, telephone and Journal billing records show calls between Foley and Lardner and Marie Rohde, the Journal reporter responsible for the dognapping stories, Ron Curtis, at WTMJ Radio, Paul Kritzer at the Journal/Sentinel and Charlie Sykes.[216:ex:101,02,05,06,07,08,10] [B-AP:972]

"central" to their Motion to Dismiss. It was only after Ms. Schultz obtained Engel's telephone records, revealing his calls to the Journal/Sentinel and to Charlie Sykes, that the Journal and Sykes let Engel's calls for money be known at the "evidentiary hearing."[19]

Then there was the ambulance ruse where the Journal and Sykes intentionally elicited the following false testimony from Engel to cover up the real reason that Engel's first deposition was postponed:

HUSTON:

Q. Okay. After you left my office on August 24th and went home, what happened?

A. Well, after I left your office, I went home. I came across the - that tape.

Q. Okay

A. I - I - Oh, I know what happened. Geez, I don't know how I could forget. I got home and there was an ambulance there. My fiancé was inside the ambulance, had to go to the hospital.

Q. All right. And the deposition was postponed *then*?

A. Yes. [A-AP:535]

After spending hours going over Engel's testimony with him, Engel clearly knew that he was going to be asked this question and that he was supposed to give this false answer.[20]

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[19]The court of appeals found it "troubling" that Engel asked the Journal and Sykes for money but concluded that, although one reasonable inference could be that he was trying to "sell his testimony to the highest bidder", it was within the trial court's discretion to make that determination.[¶39]

[20]Even with several hours of coaching, if it were not for Huston's long pause (Okay.....), Engel would not have gotten this lie straight.

When the Journal elicited this false testimony from Clary Engel, they knew that Clary Engel's girlfriend was not put into an ambulance before the Journal and Sykes postponed Engel's first deposition and they knew that the first deposition was not postponed because Clary Engel's girl friend was taken away in an ambulance. Yet, they used this ambulance ruse to prevent Ms. Schultz from finding out that the Journal postponed the deposition because they had asked Engel to tape record Ms. Schultz allegedly suborning his perjury and that he didn't do it. Then, they proffered that deceptive testimony to the circuit court to support their motion to dismiss.

Engel and the Journal and Sykes were unaware that Ms. Schultz had the telephone and police records proving that no ambulance had been called before Huston called Mr. Ehlinger to postpone Engel's first deposition.[199:ex.109, [216:ex:101,02,05,06,07,08,10] Thus, Engel testified, again in the criminal proceeding, that his deposition was postponed because he got home and found his girl friend in an ambulance. [198:107] After finally being confronted with the evidence, Engel admitted that the deposition was not postponed because of the ambulance ruse concocted by the Journal. [199:25-37]

The appeals court found Engel's attempts to get money from the Journal "troubling." In fact, the "troubling" aspect of all of Engel's false testimony is not that he repeatedly lied under oath but that he repeatedly lied, under oath, for the sole purpose of *helping* the Journal and Sykes and the Journal and Sykes did not stop him from doing it.

Engel's intense motivation to lie to help the Journal and Sykes was magnified when Engel repeatedly lied about the number and length of times he met with the lawyers at Foley & Lardner. [A-AP:413,491,498,499] Clearly, the lawyers knew about those meetings. Yet, in the criminal proceeding, when

Engel testified that he did not meet with Journal lawyers to be prepared for his deposition [A-AP:413], the Journal lawyers never corrected his testimony.

After the criminal proceeding and during the hearing on fees, when Ms. Schultz had the Journal billing records proving Engel's participation in a two hour prep session on the day before Engel's deposition and in a five hour mock trial with three Journal lawyers, Engel again denied that he participated in the session before his deposition and testified that he had only met with Journal lawyers for less than an hour at some time that he could not remember [A-AP:492]. Again, the Journal did not correct Engel's false testimony.

Then there was the following bizarre testimony in which Engel, during the criminal proceeding, seems to admit to meeting with Attorney Huston on the day before his deposition and in which Mr. Ehlinger discovers that the Journal and Sykes asked Engel to call Ms. Schultz to tape record a conversation with her but that he didn't and then *called her* anyway on the day of his September 3rd deposition:

EHLINGER: Now, why would you have called her the morning of September 3rd without still having received some phone call from her? Why did you call her three times in a row the evening before and the morning of your deposition when you were about to testify against her saying that she was suborning your perjury because you were so reluctant to testify the way she wanted you to testify? Why did you place those three phone calls?

HUSTON: Object to the form of the question, Your Honor. It is multiple, complex, argumentative.

EHLINGER: Why did you place those three phone calls, Mr. Engel.

THE COURT: The witness may answer.

ENGEL: I have no recollection as to why. I don't know.
EHLINGER: What time did you meet Mr. Huston on September 2nd?
ENGEL: On the 2nd?
EHLINGER: Yeah. The day before the deposition.
ENGEL: I don't know.
EHLINGER: How long did you meet with him?
ENGEL: I don't know.
EHLINGER: Did you meet with him before or after you placed those two phone calls to Cindy Schultz?
ENGEL: I don't know.
EHLINGER: Did you tell them that you were trying to reach Cindy Schultz?
ENGEL: I don't believe so.
EHLINGER: Did he tell you that you should try to reach Cindy Schultz?
ENGEL: Yes.
EHLINGER: What did he say when he told you to try to reach Cindy Schultz?
ENGEL: He asked if I would make a call to her.
EHLINGER: Did he tell you what to tell her?
ENGEL: No.
EHLINGER: Did he tell you why you should make that call?
ENGEL: He told me something. I am unsure of exactly how he put it.
EHLINGER: Tell me what ever you remember about how he put it?
ENGEL: He asked me if I would make a phone call to Cindy Schultz.
EHLINGER: Did he say anything at all about what you should do in that phone call?
ENGEL: Talk with her about this.
EHLINGER: About what?
ENGEL: About me lying, all of these notes and stuff.
EHLINGER: Um humm. What did he tell you you should say about you lying, about all of these notes?

ENGEL: He didn't say that. He wasn't trying to put words in my mouth. He asked me if I would make a phone call to Cindy Schultz.

EHLINGER: Did he tell you to ask Cindy Schultz any questions?

ENGEL: No, it did not go that far.

EHLINGER: How far did it go?

ENGEL: I answered no.

EHLINGER: You answered no about what?

ENGEL: Making a phone call.

EHLINGER: Why did you answer no?

ENGEL: Because I didn't want to be a Linda Tripp.

EHLINGER: Why did you call her any way?

ENGEL: I have no idea. I am telling you that she called me many times. I called her. I responded back to her calls sometimes and sometimes I didn't.[21]

EHLINGER: Was Mr. Huston asking you to be a Linda Tripp?

ENGEL: Pardon?

EHLINGER: Was Mr. Huston asking you to be a Linda Tripp?

ENGEL: No.

EHLINGER: Why did you say you refused to make the call because you didn't want to be Linda Tripp?

ENGEL: I am sorry. I guess I added that part.

EHLINGER: But you are under oath. You are not testifying recklessly here today, are you?

ENGEL: That is why I added it because that is the way I felt that is what I would be if I made the phone call.

EHLINGER: Something about what Mr. Huston asked you lead you to believe that he wanted you to be a

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[21] Telephone records proved that there wasno call from Ms. Schultz to Engel to which he could have been responding.[216:Ex.101,02,05,06,07,08,10]

Linda Tripp, is that right?

ENGEL: Correct.

EHLINGER: Linda Tripp, by the way, is someone who tape records conversations, correct?

ENGEL: Correct.

EHLINGER: And so something that Mr. Huston said to you lead you to believe that he wanted you to tape record a conversation with Cindy Schultz, correct?

ENGEL: Correct.

EHLINGER: Did he in fact say I would like you to call Cindy schultz and tape record the conversation? Did he tell you that?

ENGEL: I don't know exactly how it was said.

EHLINGER: Come on now. You must. You don't know exactly. Answer my question, please. Did he tell you that he wanted you to tape record a phone conversation with Cindy Schultz?

ENGEL: I don't recall how he put it.

EHLINGER: I am not asking you how he put it. I am asking you if he asked you to tape record a phone conversation with Cindy Schultz?

ENGEL: That is the way I took it.

EHLINGER: And you decided that you would not because you were above that sort of thing, correct?

ENGEL: I decided not to do it.

EHLINGER: And yet you called Cindy Schultz anyway that day, correct?

ENGEL: I am unsure if that is the same day.

EHLINGER: Do you have a tape recorder?

ENGEL: Yes. [A-AP:422-426]

Incredibly, Judge Wasielewski found this man credible and the court of appeals concluded that Judge Wasielewski had not abused his discretion in doing so. The above tortured

testimony demonstrates that Engel was so motivated to help the Journal and Sykes and to harm Ms. Schultz that he dragged his testimony on for hours by dodging questions that he believed, if answered truthfully, would harm the Journal and Sykes. That, however, is not the issue here.

The isssue is that Engel is a five time convicted felon and this case is not the first case in which he attempted a "money for testimony" scam. [A-AP:305] The message this five time convicted felon got from the Journal's willingness to act together with him on the false affidavit, the ambulance ruse and the concealment of his requests for money, was that his lies were condoned by the Journal and Sykes and that he was protected by his relationship with them. This man was accusing Ms. Schultz of attempting to suborn his perjury. The punishment, in this case, was based entirely on his accusations. Thus, the frauds, that the Journal and Sykes perpetrated on the court, when they aided Engel in lying, skewed the entire process. .

VI. THE ODOR, THAT JUDGE WASIELEWSKI SMELLED HAD NOTHING TO DO WITH THE DOGNAPPING.

Judge Wasielewski said that there was an "odor emanating" from the dognapping in his courtroom. [208:53]

Since almost nothing in the underlying defamation case can pass the most lenient ethical smell test, perhaps it was not the dognapping that Judge Wasielewski was smelling in his courtroom.

For instance: Why would the Journal and Sykes, after being notified of the defamations and of a potential defamation suit, repeatedly pressure the District Attorney and the police by constantly calling them and by blowing up the episode in their newspaper and on Sykes' radio broadcasts

[131:Ex.13:98-99] [131:Ex. 13:89] until they succeeded in getting a *"special prosecutor"* from Sheboygan County appointed to investigate and file charges in a Milwaukee misdemeanor *party to a dognapping* case that later had to be dismissed for lack of evidence? [A-AP:318-319] After having all of the records from the police and from the District Attorney, what possible reason would a Journal lawyer have for traveling from Milwaukee to Sheboygan for a personal meeting with the criminal case special prosecutor to discuss the dismissal of the criminal party to a dognapping charges against Ms. Schultz *after* Ms. Schultz filed a defamation action against the Journal? *What was that Journal lawyer doing in that office when he was representing the Journal in this civil defamation case?* Why did the Journal destroy Sykes broadcasts, containing evidence of defamations, after they were put on notice not to destroy the tapes because of the upcoming law suit? [A-AP:325-27] Why would an Assistant U. S. Attorney, a law enforcement officer employed by the United States government and familiar with criminal procedures, use his office to communicate with Foley and Lardner and, on taxpayer time, personally deliver a five-time convicted felon to the Journal and Sykes to give them evidence of a potential crime that the Journal and Sykes suppressed from authorities to use for their own personal benefit? What were the names of both Journal lawyers and Judge Wasielewski doing on a solicitation to get money for this same U. S. Attorney who was a witness in this case and who was also running for circuit court judge? Why did the Journal and Sykes give this same witness free air time and newspaper advertising, by announcing his candidacy on the Sykes radio show and by endorsing him in their newspaper, when they knew that this witness could be called in future proceedings and when they knew that this witness did them a huge favor by not referring Engel to the District Attorney and, instead, by delivering him to them? Why did Judge Wasielewski ignore all of the Journal frauds upon his court after they were clearly pointed out to him in Schultz's Motion for Reconsideration? [126] Why, when there were other legal procedures and lesser

sanctions available to him, did Judge Wasielewski rely exclusively on his "inherent powers:" to conduct a criminal proceeding within a civil case to impose the drastic sanction of dismissal of valid claims, to pile on a severe and unprecedented criminal fine of $168,949.97 and to impose a sanction that punished Ms. Schultz *only* if she challenged his decisions by exercising her right to appeal....*all for the benefit of the Journal and Sykes*? After making multiple decisions in this case, how did the First District Court of Appeals become so prejudiced that the *entire* court felt they had to recuse themselves, without explanation, in the middle of this appeal? Why, to protect the interests of Clary Engel, did the First District Court of Appeals and the Circuit Court permit the Journal and Sykes to seal his *PUBLIC* criminal records in violation of Wisconsin's open records laws and why did the First District Court of Appeals make this ruling *without waiting* for an objection to the Journal motion from Ms. Schultz or the Animal Lobby?

Then there are the many incongruities in the 4th District Court of Appeals decision.

1.) How could the 4th District Court of Appeals, after reading Ms. Schultz's and the Animal Lobby's briefs, that clearly argued that the basis for their appeal was that the "evidentiary hearing" was not an evidentiary hearing but was a "criminal bench trial," ignore that entire argument and make the determination that "On appeal, Schultz and ALI assert that the circuit court: (1) was without authority to hold an evidentiary hearing?"[¶1]

It is inconceivable that the 4th District Court of Appeals could have possibly concluded, from any of the following arguments and the entire brief, that Schultz and ALI were asserting that the circuit court "was without authority to hold an evidentiary hearing"

"The hearing, in fact, turned into what even the court and defendants recognized was a bench trial on subornation of perjury. [202:191; 204:55,86; 208:31,59; 210:7,8,37,69; 211:12,13,71; 21:112]"

"Plaintiff does not dispute that § 901.04, Stats., authorized the court to hold an evidentiary hearing prior to the jury trial to determine what evidence could come into the jury trial."

"To allow a trial court to conduct a bench trial, in lieu of a jury trial, to decide credibility issues would create a cottage industry of side car litigation. It would allow trial courts to conduct grand jury investigations during the course of civil litigation in an attempt to "end run" jury trials and, as in this case, the criminal justice system."

"Besides violating due process by becoming the trier of credibility, the court, in the instant case, violated plaintiff's due process rights in other ways. It conducted a criminal bench trial within a civil case and concluded that the dismissal was punishment for finding the plaintiff guilty of that crime[206:8-9].

Since the bench trial was actually a trial and not simply an "evidentiary hearing," the burden of proof should have been the criminal burden.

2.) How could the 4th District Court of Appeals possibly take Ms. Schultz's argument, that Wisconsin does not recognize the bad faith exception to the American Rule, to mean that she was arguing that, when dismissing a case, bad faith and frivolous were one and the same?

First the appeals court claimed that: "Schultz and ALI argue that dismissal is proper only when the plaintiff acts in bad faith, and that, here, "a finding of bad faith is impossible since the case was not frivolous." [¶14] *Nowhere* in Ms. Schultz's appeal did she ever argue that a court, when considering whether to dismiss a case, had to find a case frivolous in order to find bad faith. Ms. Schultz clearly argued at page 36-37 of her main brief that:

> "Federal Courts recognize a bad faith exception to the American Rule. One of the standards for the bad faith exception is that the case is entirely without color. Courts have consistently declined to uphold awards under the exception, absent clear evidence that the challenged actions are entirely without color and are taken for reasons of harassment or delay or for other improper purposes. "[T]he trial court must find clear evidence that (1) the offending party's claims were meritless and (2) the party acted for improper purposes." Agee v. Paramount Communications, Inc., 114 F.3d 395, 398 (2d Cir. 1997). The test is conjunctive and neither meritlessness alone nor improper purposes will suffice. See Browning Debenture Holders' Committee v. DASA Corp., 560 F.2d 1078, 1088 (2d Cir.1977). In the instant case, the court found just the opposite. The court found that the case had merit when the court dismissed the case. Thus, the trial court could not have found bad faith, as required by the inherent powers doctrine in federal courts."
>
> "Additionally, Wisconsin has §814.025(3)(a), Stats., a law that is has taken the position of the federal bad faith exception to the American Rule. Bad faith is defined in that statute as "an

> action"...commenced, used, or continued...solely for purposes of harassing or maliciously injuring another." Id. The court in the instant case made no finding that the plaintiff used this case to harass or maliciously injure the defendants. Moreover, the court could not have found bad faith in this case because the court found that it was not frivolous.[208:48,53]. For bad faith to be present, the case must be frivolous."

After mis-characterizing Ms. Schultz's argument to mean something that had no basis in law, the court of appeals relied on that mis-characterization to dismiss Ms. Schultz's valid argument that Wisconsin does not recognize the bad faith exception to the American Rule in the context of attorney fee awards: "Schultz again argues that attorney fees can be awarded only when a party has acted in bad faith, which she claims requires a showing that the party's claims were without merit. We have considered and rejected this argument in ¶14, and need not address it again here." [footnote 8]

3.) How could the court of appeals conclude that Engel was an important witness when the record reflected the exact opposite?

The Appeals Court mis-characterized the circuit court's findings when it said: "The circuit court did not accept Schultz's assertion that Engel was an unimportant witness, and, we believe, with good reason." [¶15].

As pointed out earlier in this motion, Judge Wasielewski never concluded that Engel was an important witness. In fact, Judge Wasielewski concluded that Engel would not have been an important witness if he ever would have been proffered as one.[208:51] That is why Judge Wasielewski could not find the case, or any part of it, frivolous.

4.) How could the court of appeals misinterpret a U. S. Supreme Court opinion, so drastically, that the misinterpretation resulted in the unprecedented conclusion that a civil trial court can, under its' "inherent powers," punish a litigant for conduct the court finds in a separate criminal case?

The appeals court concluded that: "The high degree to which the behavior in both cases was tied together justified the court's decision to also consider both in assessing sanctions. Cf. Chambers v. NASCO, Inc., 501 U.S. 32, 57 (1991) (holding that a court may impose sanctions for misconduct that occurred before other tribunals). In sum, the circuit court's consideration of Schultz's previous attempt at suborning perjury did not constitute an "irrelevant factor," requiring us to conclude that the circuit court erroneously exercised its discretion."[¶18]

The Supreme Court, in *Chambers v. Nasco*, *never* held that a court could use its inherent powers to impose sanctions for misconduct occurring before other tribunals and neither has any other court in the United States.

5.) How could the court of appeals, when concluding that other sanctions were not available to the circuit court, not be aware of Ms. Schultz's argument and not know that the circuit court did not consider other lesser sanctions?

It is almost impossible to believe that the appeals court was doing anything but trying to fit a square peg into a round hole when it concluded: "There are options other than dismissal available to circuit courts imposing sanctions on parties engaging in fraudulent behavior. Because dismissal is an "extremely drastic penalty," Hudson, 194 Wis. 2d at 542, circuit courts must use their authority with restraint and should consider whether there are less severe sanctions that would adequately deter and punish the misconduct. In this

case, Schultz and ALI suggest that instead of dismissing the case, the circuit court could have prohibited her from calling Engel as a witness. This suggestion is unrealistic, however, because it is almost certain that Schultz herself would have decided not to call Engel, as it was Engel who provided testimony that Schultz had asked him to lie. In short, because the finding of misconduct consisted of attempted subornation of perjury, we cannot conclude that the circuit court exercised its discretion erroneously by determining that other sanctions would be inadequate."[¶19]

The court of appeals said that they "could not conclude that the circuit court exercised its discretion erroneously by determining that other sanctions would be inadequate." Judge Wasielewski *never* determined that other sanctions would be "inadequate." Judge Wasielewski never considered other sanctions until he piled them on top of the drastic sanction of dismissal. Next, the court of appeals suggests that Ms. Schultz argued, in her brief, that the *only* other sanction available to Judge Wasielewski was that of not permitting Ms. Schultz to call Engel as a witness.

It is impossible to believe that the court of appeals got far enough into Ms. Schultz's brief to get to that suggestion but never made it to the next sentence. Ms. Schultz's actual suggestion was as follows: "Following an evidentiary hearing, the court could have prohibited plaintiff from calling Engel as a witness in the jury trial.[22] Or, the court could have allowed defendants to put Mr. Engel and his claims in front of a jury."[pg. 17, C. Schultz appeals court brief]

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[22] Plaintiff notes that her motions in limine [106,107, 108] were filed after defendants filed their motion to dismiss [97,98], which contained defendants' allegations regarding subornation of perjury. Yet, plaintiffs' motions in limine did not seek to exclude Clary Engel as a witness or to exclude any of the perjury allegations defendants had made about her.

6.) How could the court of appeals have missed the fact that Clary Engel lied about the number of his criminal convictions and then conclude that, because he told the truth, the information contained in Engel's criminal record could not be used to impeach his other false testimony?

The appeals court, relying on case law and rules of evidence that apply to *criminal bench trials* and not §901.04 evidentiary hearings, concluded: "Finally, with regard to the court's limit on the evidence relating to the nature of the convictions, we have held that the scope of inquiry for impeaching witnesses through prior convictions is very narrow. State v. Sohn, 193 Wis. 2d 346, 353, 535 N.W.2d 1 (Ct. App. 1995). Counsel may ask if the witness has been convicted of a crime, and if so, how many times. Id. If the witness's answers are truthful and accurate, no further inquiry may be made. Id. Engel admitted on cross-examination that he had been convicted nine times. Therefore, no further inquiry was permissible and the circuit court correctly prohibited more questions. [¶31]

First, apparently the appeals court forgot that the criminal proceedings, in the underlying case, was supposed to be an *"evidentiary hearing."* More importantly, however, is that the appeals court mis-characterized the circuit court record which clearly shows that, when Engel was asked how many times he had been convicted of a crime (in both his deposition and in the criminal proceeding), *he lied*. This was clearly pointed out to the court of appeals at page 33 of Ms. Schultz's main brief:

> Further evidence, that the court was conducting a bench trial, is the manner in which the court excluded the evidence of Mr. Engel's criminal records from the "evidentiary hearing." The court had an "evidentiary hearing" within the

main "evidentiary hearing" to determine whether to exclude the criminal records as evidence in the main "evidentiary hearing" that was really a bench trial. [A-AP:358-62]. Even further proof that the court thought it was conducting a bench trial was when, after Mr. Engel lied in his deposition and on the stand about the number of times he was convicted, the court instructed the defendants' to consult with Mr. Engel and have him correct his testimony. If the court had allowed the impeachment of this witness it would have found that Mr. Engel lied in this case about the number of aliases he used, the number of times he was convicted, that, in one of his criminal cases, he was involved a scam of payment for testimony [A-AP:305], that he was on probation when Ms. Schultz allegedly suborned his perjury but he did not report it to his probation officer[216:Ex.103-04], that his wife was brutally murdered (it remains unsolved) in the middle of a child custody dispute, after she had threatened to turn Engel into police for a burglary and after she had several times reported to police that she was afraid that he would kill her [216:Ex.103-04] and that Mr. Engel is a celebrated liar and con man [A-AP:304-09]. The court sealed and would not permit the information in Engel's criminal records to be used for impeachment [A-AP:362-64]. The United States Supreme Court held, in Green v. Bock Laundry Machine Company, 490 U.S. 504, 109 S. Ct. 1981, that a judge "must permit impeachment of civil witness with evidence of prior felony convictions regardless of ensuant unfair prejudice to the witness or the party offering the testimony." In the instant

> case, the court's decision to prevent the plaintiff from impeaching Mr. Engel's false testimony with prior bad act evidence is even more erroneous because the court, in the instant case, was supposed to be conducting an "evidentiary hearing" where evidence is not excluded.

7.) How did the court of appeals miss five pages of Ms. Schultz's brief that clearly cited to the record and explained contradictions in Engel's testimony when the court of appeals concluded: "In her brief Schultz claims that Manson and Jones did not contradict her testimony and that 'only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston [one of the Journal's attorneys], Ms. Rowe [one of Schultz's former attorneys], Ms. Majerus, Ms. Volk [a friend of Schultz who was involved in the dognapping], Ms. Kiedrowicz [Schultz's sister], and Mr. Ehlinger [one of Schultz's current attorneys] were all lying could Mr. Engel's version of events be true.' Schultz, however, provides no citation to the record to support this assertion, nor does she explain how each of these individuals contradicted Engel's testimony. Rather, Schultz admitted under oath that her testimony conflicted with that of Engel, Manson, Jones, and also Detective Staudacher, one of the officers who had investigated the dognapping case." [¶43]

Is that right? Then what would the court call this:

SCHULTZ REPLY BRIEF: PG. 3-8

> "Before discussing this non-corroboration, it is important to note that the bench trial, within this defamation case, was about whether or not Ms. Schultz was involved in a dognapping that was the subject of a dismissed misdemeanor party to a dognapping case and that had nothing to do with the claims in this case. Thus, the entire process was the result of a smokescreen sent up, by the

defendants, to avoid a jury trial on defamation claims in which Sykes and the Journal had falsely reported that Ms. Schultz and the Animal Lobby, Inc. had a dog killed and carved up to get publicity and to prove a political point. Thus, although the following discussion addresses the dognapping issue, it is only to prevent the respondents' accusations from going unanswered. It is not a concession that the dognapping smokescreen was even remotely material to the claims that were scheduled to go to a jury.

Respondents say at p. 11 that "Ms. Schultz admitted that only if Mr. Engel, Ms. Manson, Ms. Jones were all lying could her version of events be true." Ms. Schultz admitted no such thing. In fact, the record shows that only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston, Ms. Rowe, Ms. Majerus, Ms. Volke, Ms. Kiedrowicz and Mr. Ehlinger were all lying could Mr. Engel's version of events be true. For this preposterous statement on p. 11, defendants cite to portions of Ms. Schultz's cross examination. However, the record shows that, in that cross examination, Ms. Schultz was forced by the court to repeatedly respond to fabricated hypothetical questions [B-AP:1157]. Ms. Schultz objected to certain questions because their assumption was not true. The court intervened and told her she should not argue with the premise of the question [B-AP:1157]. Regarding the non-corroboration of Engel, June Ellen Jones and Barbara Manson never corroborated any of Mr. Engel's testimony that Ms. Schultz stole the dogs or that she even told them that she stole the dogs.

The testimony of Ms. Jones and Ms. Manson that they had phone conversations with Ms. Schultz about the dogs does not corroborate Engel and does not prove that Ms. Schultz stole the dogs. Ms. Schultz has always admitted that she knew the whereabouts of the dogs. Judge Foley recognized this during the first summary judgment hearing in this case in September 1998: "She also acknowledged being involved in the post-theft relating of the dogs, if you will." [B-AP:1167-68]. Additionally, Ms. Jones repeatedly testified that Ms. Schultz told her she did not steal the dogs [B:AP:1075]. Respondents cite June Ellen Jones' statement in a police report as corroborating evidence [D632]. However, Jones testified that what was in the report was "not what happened" and that the affidavit in this case, that defendants traveled to Illinois to get her to sign, was not accurate [B:AP:1079].

Neither did U.S. Attorney Joe Wall corroborate Mr. Engel. He simply repeated what Engel allegedly told him. In fact, Mr. Wall testified that he could not vouch for the truthfulness of Mr. Engel. [B-AP:1021]. Mr. Wall also testified that Clary Engel never told him that Engel tried to get money from the Journal and Sykes on the evening that Engel called him before his first deposition [B-AP:1023]. Engel first testified that he called Wall and later even denied making the call to Wall [B-AP:1014]. Even the trial court, in its decision, said it was giving less weight to Mr. Wall's testimony. The court called it "dependent corroboration" [A-AP:112] because it was dependent upon what Engel told Wall.

At page 24, respondents say, "No one supported Ms. Schultz's version of the events, not even her own sister." Respondents could give no cite for this allusion because Ms. Schultz's sister was not a witness at the dognapping bench trial that was substituted for the defamation jury trial. Respondents, however, even try to use that against Ms. Schultz. On p. 27, they call her sister a "missing witness" in the illegal hearing. Yet, respondents themselves served Ms. Kiedrowicz with a subpoena [B-AP:1161] only to withdraw it when a review of her deposition revealed that her testimony supported Ms. Schultz's version of the events [B-AP:1024].

Respondents imply, at p. 28, that Ms. Schultz attorneys corroborated Mr. Engel. In fact, her attorneys corroborated Ms. Schultz's statements that Ms. Schultz was a very active participant in her own defense and that she drew up a list of questions and answers for all of her proposed witnesses and that her attorneys had those outlines along with the outline of Mr. Engel's testimony [B-AP:1059, B-AP:1073]. Furthermore, the court, in its' decision specifically said that it believed Attorney Ehlinger's affidavit testimony [A-AP:116-17] that Mr. Engel had called him to give him a statement [B-AP:1001] even though Mr. Engel testified that he never gave Mr. Ehlinger a statement [A-AP:540]. Attorney Lisa Rowe had a similar situation where she testified that Engel spoke to her and gave her a statement [B:AP:1055]. Engel testified that he never spoke to Lisa Rowe [B-AP:1062B].

In discussing the alleged "scripts," respondents ignore that they were drawn up in 1997, prior to the filing of this action, for an entirely different case over which the trial court, in this case, had no jurisdiction. Moreover, at pg. 7, the defendants say that Ms. Schultz had "included Mr. Engel's false alibi in her plans for this lawsuit." Plaintiff's preliminary witness list, that was not filed with the court and only given to the defendants [B-AP:1082], shows that Mr. Engel was not listed as being able to give any testimony about the dognapping. He was listed as a possible witness who claimed he heard the Sykes's broadcast about Ms. Schultz killing and carving up a dog [B-AP:1087]. This witness list was put together five months before Engel claimed that he was first asked him to give false testimony about hearing the Sykes's broadcast.

Respondents claim, at p. 6, that Ms. Schultz's summary judgment affidavit falsely claims that she played no role in connection with the dogs and helping to place them, so that her affidavit contradicts Ms. Jones and Ms. Manson and therefore corroborates Mr. Engel. This is simply not true. Ms. Schultz affidavit clearly states her involvement:

My involvement with the Smith dog incident after the dogs were taken was, as I truthfully reported to the police, restricted to receiving an anonymous call from an individual who told me he had taken the dogs, telephoning Phyllis Wexler to tell her that I had heard the dogs had been taken, speaking to the police, videotaping the premises from which the dogs had been

taken on the following day with the knowledge and at the request of the Whitefish Bay Police Department, and returning and taking phone calls from individuals who had been asked to attempt to locate individuals who would care for the animals. [D:651]

Thus, respondents misrepresented Ms. Schultz's position when they said at p. 3, without any cite, that she "showed every sign of wanting to exculpate herself."

Not only do defendants falsely argue that Mr. Engel's testimony was corroborated, they also whitewash Mr. Engel's testimony. They say, at p. 25, that he was "confused about a deposition preparation session" when in fact he repeatedly lied, was evasive and "feigned confusion" about his contacts with defendants' attorneys [A-AP:413,491,498,499].

One of Ms. Schultz's attorneys, Lisa Rowe,[23] testified that she had spoken to Mr. Engel at the time and that what he told her was consistent with the notes that Ms. Schultz had given her [216:Ex.45,4-5]. Mr. Engel testified that he never spoke to Ms. Rowe [197:92]. Mr. Ehlinger, Ms. Schultz's attorney in the trial court, testified that Mr. Engel had called him and told him the same things that were in the notes that Ms. Schultz had given to her attorneys in the dognapping case [102:1-12]. Mr. Engel denied calling or having the

[23] Lisa Rowe was the Assistant District Attorney in Sheboygan County at the time the court ordered her to give a deposition in this defamation case.

> conversation with Mr. Ehlinger [A-AP:539-41]. Mr. Engel's telephone records proved that he had called Mr. Ehlinger [216:Ex.101,02,05,06,07,08,10]. The court specifically said that it believed Mr. Ehlinger." [204:78-79]

8.) How could the court of appeals completely over look the $45,000.00 sanction in the *Mackler* cases to conclude that *Mackler* was inapposite because: "*Mackler* likewise fails to support the appellants' argument. Although *Mackler* extended *Bagwell's* holding to include certain sanction proceedings involving discovery abuses, its decision was limited to sanctions that were explicitly punitive and payable to the court rather than the opposing party. *Mackler*, 146 F.3d at 129. A later Second Circuit case made this clear when it upheld a district court's decision to award attorney fees, imposed without criminal procedural protections, as a sanction for making false statements and in spite of the party's objection that the sanction was contrary to Mackler. Margo v. Weiss, 213 F.3d 55, 62-63 (2d Cir. 2000). "[¶51]

The *Mackler* cases are discussed at length earlier in this motion. None of the *Mackler* cases have anything to do with "discovery abuses." None of the *Mackler* cases are limited to sanctions "payable to the court." None of the *Mackler* cases "upheld" the award of attorney fees. Futhermore, the court of appeals relied on *Margo v. Weiss, 213 F.3d 55, 62-63 (2d Cir. 2000)*, to discredit *Mackler*. *Margo* does not limit the holdings in *Mackler* and the *Margo* court proved that it didn't when it concluded that the proceedings in *Margo* were not of the quasi-criminal variety discussed in *Mackler* and that the District Court did not even say that the plaintiffs or their counsel committed perjury *Margo 213 F.3d at 62*. In *Margo*, 213 F.3d at 61, an attorney and his client were sanctioned, under Federal Rule 11 and the Copyright Act, for prolonging baseless litigation by submitting admittedly false affidavits to the court.

The sanction of $22,680.00 was to compensate the opposing litigant for the extra costs of defending the baseless lawsuit. In the instant case, the trial court concluded that no part of the case was baseless. [A-AP:139, 144] The Journal created the need for the extra costs and legal fees by prolonging the litigation because they wanted to avoid a jury.[210:24-25] And Judge Wasielewski, under his "inherent powers," clearly believed he was conducting a criminal bench trial to impose severe punishment, not calibrated to any damages, for what he repeatedly called attempted subornation of perjury.

9.) How could the appeals court have read Ms. Schultz's testimony that she did not read all of an expert report: "In response to a question regarding what the exhibits contained, Schultz responded, "To be honest, I have not even read this. I just got this from Ralph[Ehlinger, Schultz's attorney]. I have not even seen these things."[footnote 9, decision], but entirely miss Ms. Schultz's very next sentence in her testimony: "No, I read this part. I have not read all of the writing about his conclusions?"

The appeals court concluded that Judge Wasielewski did not abuse his discretion by not permitting Ms. Schultz to testify to financial data contained in an expert report: "It was Schultz's burden, however, to come forward with evidence regarding her financial status. See White, 908 F.2d at 683. Schultz contends that she met this burden, but we disagree. The only documents Schultz offered that reflected her financial situation were two reports prepared by experts analyzing the losses incurred by Schultz as a result of the Journal's alleged defamation. The circuit court rejected these documents as hearsay because the expert was not there to testify and *Schultz was not familiar with the documents*. The circuit court did not misuse its discretion in refusing to consider the reports. An expert report is hearsay and cannot be accepted into evidence unless it falls into one of the hearsay exceptions. See R.S. v. Milwaukee County, 162 Wis. 2d 197, 204-05, 470 N.W.2d 260

(1991). The appellants have not suggested that the report is an exception to the hearsay rule, and we are unable to locate one that applies [¶52]

Ms. Schultz, in her brief, clearly pointed out the following in her brief:

> Plaintiff Schultz attempted to have the court consider her personal financial condition along with that of the Animal Lobby. She supplied the court with an expert report that was based on financial information that the Animal Lobby and Ms. Schultz supplied to an accountant. Defendants objected. The court refused to hear the testimony on the financial information or to allow it into evidence [212:77-82] even though Ms. Schultz tried to explain that, while she could not testify to the expert's conclusions, she was competent to testify to the accuracy of the financial information contained in her expert's reports that relied on her own and the Animal Lobby's tax returns and financial data and on which she had personal knowledge [212:79-83]. When plaintiff's attorney questioned the defendant's general counsel about the wealth of the defendants, the court refused to allow him to complete his inquiry [211:119]. Additionally, before the court awarded fees, Ms. Schultz was forced to testify to her income to assist the defendants in the collection of their anticipated judgment [206:21-22]. She did and she testified that she did not have assets of even $50,000.00 much less $155,700.00. The court asked Mr. Huston, the lawyer for the defendants, if, during the course of litigation, he had received tax returns from the plaintiff. Mr. Huston told the judge that he had not received tax returns

in spite of the fact that defendants, through discovery, had Ms. Schultz's tax returns [206:21-22]. Mr. Huston also did not tell the court that he had all of the financial information on the Animal Lobby, Inc. including tax returns, state financial reports, check book stubs and contributor lists [45:1-10, 56:2]. Finally, after the court refused to permit the plaintiff to testify to her own financial status or to the financial status of the Animal Lobby, Inc., the Court , in it's decision [212:107] said:

"There really is not much known about her ability to pay currently such as what her assets, debts, and sources of income are. That has not been fleshed out. So that while she requests that that be taken into account, it is hard to give it much consideration when the evidence on the subject hasn't been fleshed out for the Court."

In *Kunstler, Nakell, Pitts, Robeson Defense Committee v. Britt, 914 F. 2d 505 (1990).* the court held: "It is hornbook law that the financial condition of the offender is an appropriate consideration in the determination of punitive damages." Furthermore, the court said that "When the monetary sanction is large, however, the parties should generally be given the opportunity to submit affidavits on their financial status." *914 Fd.2d 505 at 45*.

In this case, the court had Ms. Schultz on the stand. The tax information for the Animal Lobby, Inc. had been transposed to an accountant's report and analysis. Yet, the court

> refused to consider it and refused to enter the reports into evidence [212:76-82]. Furthermore, the defendants knew that the Animal Lobby had no assets and no ability to pay a large judgment because the defendants, themselves, had all of the financial information for the organization [45:1-10, 56:2].

In addition to describing the testimony in her brief, the following testimony was available, in the record, to the appellate court:

FLYNN: You provided Mr. Schlict tax returns and financial documents in which to prepare that?

SCHULTZ: Yes.

FLYNN: Keep looking at Exhibit 13. You have personal knowledge of the tax returns and other financial documents which you gave to Mr. Schlict in order to prepare that report?

SCHULTZ: Yeah, I know about them.

FLYNN: Does Exhibit No. 13 accurately reflect the records that you keep regarding financial documents upon which Mr. Schlict based the record?

SCHULTZ: Yes.

FLYNN: I want to draw your attention to Exhibit 14 and ask if you can identify this document?

SCHULTZ: That is the other report. What is that report for?

FLYNN: Would you identify that, please, in more detail?

SCHULTZ: The report that Norb Schlict did on the economic loss to Cynthia Schultz.

FLYNN: More specifically your consulting business?

SCHULTZ: Political consulting, correct.

FLYNN: And you provided for him tax returns and other financial documents that you regularly keep in your records for him to prepare that

report?

SCHULTZ: Yes.

FLYNN: And you are personally familiar with those documents and those figures?

SCHULTZ: Yes. [212-79-83]

FLYNN: And does that report, Exhibit No. 14, accurately reflect the figures taken from the tax returns and other financial records that you keep?

SCHULTZ: Yes.

FLYNN: Thank you. I have no further questions. I would move Exhibits 13 and 14 into evidence at this time.

HUSTON: Ms. Schultz, you gave certain financial information to Mr. Schlict, correct?

SCHULTZ: Yes.

HUSTON: He then organized that information in a way that it was not organized in your tax returns themselves, correct?

SCHULTZ: I don't know.

HUTSTON: You don't know?

SCHULTZ: Un un.

HUSTON: He drew some conclusions after organizing this material in the way that he chose to organize it, correct?

SCHULTZ: I don't know.

HUSTON: Would you agree with me, though, that Exhibits 13 and 14 contain Mr. Schlict's thoughts and conclusions about the tax returns and other information that you gave to him?

SCHULTZ: I would think so yes. To be honest, I have not even read this. I just got this from Ralph. I have not even seen these things.

HUSTON: Okay. Your Honor, I object to their entry because they are hearsay and because Ms. Schultz has not laid a foundation that would warrant their admission over the hearsay objection.

SCHULTZ: No, I read this part. I have not read all of the writing about his conclusions.

THE COURT: All right.

MR. FLYNN: If I could follow up on that a little more so that the record is clear?

THE COURT: I think the record is abundantly clear now. You will not get these in without Mr. Schlict. That is what I said about 10 minutes ago. You wanted to lay a foundation which I knew you couldn't lay. I gave you the opportunity to add it. I am not surprised that you were not able to do it. You need quite a slight of hand to be able to get this in without Mr. Schlict here. The hearsay objection is sustained. 13 and 14 will not be received.

FLYNN: She says she hadn't read its text.

COURT: I don't care whether she hadn't read it or not. It has nothing to do with my ruling. The fact is she is not the preparer of the document. The preparer is not here to be cross-examined on the facts and the conclusions and how the conclusions were reached.

FLYNN: All right.

There is no hearsay rule that prevents a party from testifying, in an "evidentiary hearing," to financial data with which they are familiar and that they supplied to an expert. However, that is not the issue in his motion. The issue is...why did the appeals court cut out a portion of Ms. Schultz's testimony and ignore the rest, thus changing the entire picture?

10.) How did the appeals court miss the entire section in the appellate court brief entitled: "THERE IS NO STATUTORY OR CASE AUTHORITY FOR THE FEE AWARD. THE AWARD WAS UNREASONABLE BECAUSE IT WAS AN EXCESSIVE FINE THAT WAS

NOT CALIBRATED TO DEFENDANTS' DAMAGES." [page 9, Schultz appellate reply brief] when it concluded: "...neither appellant challenged the reasonableness of the fee award in their main briefs so we need not consider this issue. Although Schultz states in her reply brief that she is challenging the award's reasonableness, she fails to explain why she believed the circuit court's determination was in error. Therefore, this argument was waived. In re Estate of Bilsie, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508 (1981) (appellant may not raise issue for the first time in reply brief); Reiman Assocs., Inc. v. R/A Advertising, Inc., 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue raised but not briefed or argued is deemed abandoned).

11.) How did the appeals court miss, not one, but several Animal Lobby, Inc. letters to the Journal/Sentinel giving them notice of the defamations and an opportunity to correct those defamations when the letters were pointed out at page 7 in the main brief and when the letters were at [A-AP:320-337] in the appendix of the appeal?

After having the Animal Lobby's letters to review in the appendix of their brief, the appeals court concluded: "The Journal denied in its answer that ALI had demanded a retraction, and that was all it was required to do. Therefore, because ALI never demanded a retraction from the Journal Sentinel, its claim against the Journal Sentinel must be dismissed." [¶57]

While the issues, outlined in this number VI, do not outline frauds on the court, they certainly demonstrate the appearance that the powerful Journal, with the large prestigious law firm of Foley and Lardner, have been held to a different set of standards in both the circuit and appellate court and they demonstrate why the Journal and Sykes

arrogantly concluded that their frauds on this court would go unaddressed and unpunished.

VII. REQUESTING A SANCTION FOR THE JOURNAL'S FRAUD IS NOT A COLLATERAL ATTACK BY MR. SCHULTZ.

Although Mr. Schultz's wages are being garnished to pay the judgment in the underlying case, the appeals court concluded that Mr. Schultz could not challenge the decisions in the Circuit Court in the underlying defamation case.

Mr. Schultz disagrees with the appeals court. Nonetheless, this motion is not challenging the Circuit Court's findings. This motion has to do with frauds perpetrated on this court in a response to Ms. Schultz's petition for review of a judgment for which, to pay, Mr. Schultz's wages and other property have been taken.

Additionally, fraud is a ground for collateral attack in Wisconsin. Associated/F&M Bank v. Johnson, Walker, Badger Capitol Corp., Jensen, 2001 WL 1404515 (Wis. App.) (Nov. 12, 2001) (pending publication) ¶17 *See State Central Credit Union v. Bayley, 33 Wis.2d 367, 372-73 (1967).*

CONCLUSION

The Journal and Sykes have repeatedly misled this court, the court of appeals and the trial court about factual material matters. Without those frauds, the Journal's and Sykes' issues in their response to the petition filed with this court have no basis in law or fact.

Mr. Schultz asks that this court sanction the Journal and Sykes pursuant to §802.05 Wis. Stat. or under the supreme court's "inherent powers" for perpetrating these frauds upon this court.

December 14, 2001

s/John R. Schultz
John R. Schultz, *pro se*

Pet 377

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January 29, 2002

To:

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You are hereby notified that the Court has entered the following order:

00-2595 Matter of Schultz: The Journal Sentinel v. Schultz L.C. #98CV724

A petition for review pursuant to Wis. Stat. § 808.10 and a motion for sanctions having been filed on behalf of debtor-appellant-petitioner, John R. Schultz, husband of Cynthia A. Schultz, and a motion to strike having been filed on behalf of creditor-respondent, The Journal Sentinel, Inc., et al., and considered by this court;

IT IS ORDERED that the motions and the petition for

review are denied, with $50 costs awarded to credit-respondent, The Journal Sentinel, Inc., et al.

Prosser, J., dissents.

Crooks and Sykes, J.J., do not participate

Cornelia G. Clark
Clerk of Supreme Court

638 N.W.2d 76
248 Wis.2d 791, 2001 WI app 260
No. 00-259500-2595
STATE OF WISCONSIN IN COURT OF APPEALS
DISTRICT I

In re the Matter of Cynthia A. Schultz and the Animal Lobby, Inc., Plaintiffs, v. Charles S. Sykes, Journal Broadcast Group, Inc. and Journal Sentinel, Inc., Defendants:
The Journal Sentinel, Inc.
Creditor-Respondent,
v.
John R. Schultz, husband of Cynthia A. Schultz,
Debtor-Appellant,
Wisconsin Housing and Economic Development Authority,
Garnishee.

APPEAL from an order of the circuit court for Milwaukee County: TIMOTHY G. DUGAN, Judge. Affirmed.

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1. DYKMAN, J. John R. Schultz appeals from an order of the circuit court concluding that fifty percent of his wages are subject to garnishment to satisfy a judgment held by Charles J. Sykes, Journal Broadcast Group, Inc., and Journal Sentinel, Inc., against his wife, Cynthia Schultz. John argues that his wages should be exempt from garnishment because he and his wife have a marital property agreement that classifies his wages as individual property. Alternatively, John asserts that the garnishment violates several of his constitutional rights. We conclude that John and Cynthia's marital property agreement is not binding on the Journal because it had no notice of the agreement, and that John's constitutional rights were not violated. We therefore affirm.

I. Background

¶2. The underlying case supporting this garnishment action began as a claim for defamation by John Schultz's wife, Cynthia Schultz, and The Animal Lobby, Inc., against Charles J. Sykes, Journal Broadcast Group, Inc., and Journal Sentinel, Inc. The circuit court dismissed their claims as a sanction, however, after finding that Cynthia had attempted to suborn perjury from a witness. As an additional sanction, the circuit court awarded costs and attorney fees of $168,944.97 incurred by the defendants in prosecuting their motion to dismiss. We affirmed the circuit court's judgment as it pertained to Cynthia. See Schultz v. Sykes, No. 00-0915 (Wis. Ct. App. October 4, 2001).

¶3. Because Cynthia had no assets, the Journal Sentinel began wage garnishment proceedings against Cynthia's husband, John, to satisfy the judgment. In his answer to the garnishment notice, John responded that his wages were exempt from garnishment because the Journal's judgment was against Cynthia, not him, and that he and Cynthia had a marital property agreement classifying all of John's income as his individual property. After a hearing, the circuit court concluded that the judgment against Cynthia constituted a tort obligation under Wis. Stat. § 766.55(2)(cm) (1999-2000)[24] and that John and Cynthia's marital property agreement did not affect the Journal's right to use Cynthia's interest in the marital property to satisfy its judgment against Cynthia. Accordingly, the circuit court ordered that fifty percent of John's wages were subject to garnishment by the Journal. John appeals.

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[24]Wisconsin Stat. § 766.55(2)(cm) provides: "An obligation incurred by a spouse during marriage, resulting from a tort committed by the spouse during marriage, may be satisfied from the property of that spouse that is not marital property and from that spouse's interest in marital property." All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

II. Analysis

A. Statutory Authority to Proceed Against John Schultz

¶4. The first issue we must decide is whether and to what extent John's wages are properly subject to garnishment under the Wisconsin Statutes. Statutory interpretation is an issue of law that we review de novo. State v. Szulczewski, 216 Wis. 2d 494, 499, 574 N.W.2d 660 (1998). John argues that his wages cannot be garnished for Cynthia's misconduct because he was not a party to the original action. However, under Wis. Stat. § 766.55(2), marital property may be used to satisfy a spouse's obligation to a third party.[25] Wis. Stat. § 803.045(3), in turn, provides that creditors are entitled, after obtaining a judgment against the debt incurring spouse, to proceed against the non-incurring spouse in order to reach any marital property that is available to satisfy the judgment. In other words, the Journal has the right to proceed against John in a garnishment action as long as John's wages are properly classified as marital property. See Courtyard Condominium Assoc., Inc. v. Draper, 2001 WI App 115, ¶11, 244 Wis. 2d 153, 629 N.W.2d 38 ("Read together, Wis. Stat. §§ 766.55(2) and 803.045(3) permit the judgment creditor to proceed against all marital property to satisfy a judgment on an obligation incurred during marriage, even where only one spouse is the judgment debtor.")

¶5. With regard to the classification of John's wages, Wis. Stat. § 766.31(4) provides that, subject to a few exceptions, "income earned or accrued by a spouse ... during marriage and after the determination date[26]3 is marital property." Wisconsin

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[25]Depending on the type of obligation that was incurred, Wis. Stat. §766.55(2)(a)-(d) provides that either all of the marital property or the incurring spouse's interest in the marital property may be used to satisfy an obligation.

[26]Wisconsin Stat. § 766.01(5) provides:
"Determination date" means the last to occur of the following:
(a) Marriage.
(b) 12:01 a.m. on the date that both spousesare domiciled in this state.

Stat. § 766.01(10) further defines "Income" as including "wages." However, Wis. Stat. § 766.31(10) permits spouses to re-classify their property through a marital property agreement. See also Wis. Stat. § 766.31(7)(d). John contends that because he and Cynthia had a marital property agreement that re-classified John's wages as individual property, his wages cannot be used to satisfy a judgment against Cynthia.

¶6. The Journal does not contest the validity of John and Cynthia's agreement.[27] However, the Journal asserts that the marital agreement is not binding in this situation because it had no notice of the agreement. Under Wis. Stat. §766.55(4m), marital property agreements cannot limit the rights of a creditor "unless the creditor had actual knowledge of that provision when the obligation to that creditor was incurred."

¶7. In response, John first argues that the Journal is not a creditor, so it was not entitled to notice. He refers us to Wis. Stat. § 766.01(2r)(a), which defines "creditor" as "a person that regularly extends credit" and Matter of Geise, 132 B.R. 908 (Bankr. E.D. Wis. 1991), which held that the Wisconsin Department of Revenue was not a creditor under §766.01(2r) because it was not "a merchant who regularly extends credit." Id. at 913. John therefore concludes that the meaning of creditor does not include a "judgment creditor." The interpretation of "creditor" in Geise, however, did not occur within the context of Wis. Stat. § 766.55(4m), and Wis. Stat. § 766.01(2r)(c) provides specifically that the definition of

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(c) 12:01 a.m. on January 1, 1986.

There is no dispute that the John and Cynthia Schultz are married, or that they are domiciled in Wisconsin.

[27] A marital property agreement is invalid if it: was not signed by both spouses, Wis. Stat. § 766.58(1); is unconscionable, Wis. Stat. § 766.58(6)(a); was executed involuntarily, Wis. Stat. § 766.58(6)(b); or was executed without notice or financial disclosure to the other spouse, Wis. Stat. § 766.58(6)©). In addition, a marital property agreement may not adversely affect the right of a child to support. Wis. Stat. § 766.58(2).

"creditor" in paragraph (2r)(a) does not apply to §766.55(4m). Further, the Legislative Council Notes for § 766.01 state that the term "creditor" as used in § 766.55(4m) is meant "in a broad sense." Therefore, Wis. Stat. § 766.01(2r) did not relieve John and Cynthia of the notice requirement. Further, if the Journal did not have actual notice of the agreement, then Wis. Stat. § 766.55(4m) requires that John's wages be treated as marital property for the purpose of determining what property is available to satisfy the judgment.

¶8. The next question is when "the obligation ... was incurred" for the purpose of giving notice to the Journal under Wis. Stat. § 766.55(4m). John contends the relevant date is when judgment was entered in the underlying action, which was March 30, 2000. Because the Journal was first aware of the existence of a marital property agreement on February 15, 2000, John claims that the notice requirement was satisfied. In contrast, the Journal posits the date of Cynthia's misconduct as the one that controls, or, alternatively, when Cynthia's case was dismissed as a sanction for attempted subornation of perjury. The circuit court found that Cynthia had attempted to suborn perjury from a witness most recently in September 1999, and Cynthia's defamation suit was dismissed on January 21, 2000. Because these dates both fall before John's asserted date when notice was given, the Journal argues that the requirement of § 766.55(4m) was not met.

¶9. We agree with the Journal that the relevant date is when the misconduct occurred. In the context of tort obligations, the Legislative Council Notes for Wis. Stat. § 766.55(2)(cm) state that, for a marital property agreement to have effect, the victim must have notice "at the time the tort occurs." Although the present situation is not identical to a tort, we believe the two are sufficiently similar so that the same point of time should be used to determine when the obligation incurred. Both situations involve involuntary creditors in which the traditional purpose of giving notice of a marital agreement to a creditor, so that it can make an informed choice regarding a decision to extend credit, does not apply. Similar to a victim of a tort, the Journal had no opportunity to decide

whether it would "extend credit" to Cynthia when she attempted to suborn perjury. We therefore agree with the circuit court that John's wages are marital property for the purpose of satisfying Cynthia's debt to the Journal.

¶10. In deciding that only Cynthia's interest in John's wages, i.e. fifty percent, were subject to garnishment, the circuit court concluded that the applicable provision of Wis. Stat. § 766.55 was paragraph (2)(cm), which provides that an obligation incurred as the result of a tort may be satisfied only from the incurring spouse's interest in the marital property. Because none of the parties challenge this aspect of the circuit court's decision, we need not decide whether § 766.55(2)(cm) was the correct provision to apply, or what amount of John's wages are subject to garnishment.

B. Constitutional Issues

¶11. John asserts various constitutional arguments that we need only briefly address. He first contends that, if Wis. Stat. §§ 766.55(4m) and 803.045 authorize the Journal to proceed against him, they are unconstitutional. We give statutes a presumption of constitutionality and parties challenging a statute must show that it is unconstitutional beyond a reasonable doubt before we will strike it down. State v. Hahn, 2000 WI 118, ¶30, 238 Wis. 2d 889, 618 N.W.2d 528.

¶12. According to John, Wis. Stat. § 766.55(4m) violates due process "because it authorizes the punishment of innocent parties for crimes they did not commit." We disagree, however, that John is being "punished" at all, let alone for a "crime" that he did not commit. Rather, § 766.55(4m) is merely a notice requirement. When parties fail to give creditors notice of their marital property agreements, § 766.55(4m) provides that the default rules regarding ownership of property under the Marital Property Act will apply. Admittedly, satisfying the notice requirement with regard to involuntary creditors is no easy task. However, we do not believe this deprives John of due process of law. John has not cited authority giving him a constitutional right to shield marital property from creditors

and he is not challenging Wis. Stat. § 766.31(3), which gives spouses an undivided one-half interest in all marital property. Therefore, his argument fails.

¶13. Next, relying on Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), and Connecticut v. Doehr, 501 U.S. 1 (1991), John contends that both Wis. Stat. §§ 803.045(3) and 766.55(4m) are unconstitutional. In Sniadach and Doehr, the Supreme Court struck down two statutes that authorized the taking of property before the creditor obtained a judgment. Sniadach, 395 U.S. at 341-42; Doehr, 501 U.S. at 24. John asserts that Wis. Stat. §§ 803.045(3) and 766.55(4m) similarly circumvent the requirements of due process because they allow creditors to initiate a garnishment proceeding before obtaining a judgment against the non-incurring spouse. This argument has been made previously in other states and rejected. Yakima v. Gillett, 854 P.2d 1212, 1215 (Ariz. Ct. App. 1993); Herbert v. User, 593 So.2d 977, 979-80 (La. Ct. App. 1992); Komm v. Department of Soc. & Health Serv., 597 P.2d 1372, 1375-76 (Wash. Ct. App. 1979). We agree with these courts that due process does not require a creditor to obtain a judgment against both spouses when marital property is being sought to satisfy an obligation. One spouse is sufficient to represent the marital community. Because John's individual property is not subject to garnishment, he
has no due process claim.

¶14. John also cites to the Contracts Clause in Article I, § 10 and the Takings Clause in the Fifth Amendment of the United States Constitution, but never indicates how they might apply to this situation. We therefore decline to address those issues. See State v. Scherreiks, 153 Wis. 2d 510, 520, 451 N.W.2d 759 (Ct. App. 1989). In sum, John has not persuaded us that Wis. Stat. §§766.55(4m) and 803.045 are unconstitutional beyond a reasonable doubt.

¶15. In addition to challenging the constitutionality of the statutes, John also contends that the Journal violated his due process rights when it garnished his wages. As John recognizes, due process can be violated only if there is "state

action." See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989). Citing Lugar v. Edmonson Oil Co., 457 U.S. 922 (1982), John argues that the Journal may be treated as a state actor because it acted "under color of state law." However, acting pursuant to a statute does not, without more, make one a state actor for the purpose of the Fourteenth Amendment. Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 164-66 (1978). Moreover, if the statutes themselves are not unconstitutional, it is difficult to understand how the Journal, acting pursuant to those statutes, could be violating John's constitutional rights.

¶16. Finally, John challenges the underlying action on a number of grounds, including that the decision to award fees was a violation of his right to due process because it was made by a judge not a jury and that the amount of the award violated the Excessive Fines Clause of the Eighth Amendment. While we agree with John that "a garnishment derives its legitimacy from the suit it accompanies," it is in the context of that suit and not here that those claims should have been asserted. Cynthia did in fact raise many of the same arguments in the underlying suit, and we rejected them. Regardless, John's assertion of these issues here constitutes an impermissible collateral attack. See Schramek v. Bohren, 145 Wis. 2d 695, 713, 429 N.W.2d 501 (Ct. App. 1988) (holding that collateral attack is allowed only if party has shown underlying judgment was procured by fraud).

By the Court.-Order affirmed.

Recommended for publication in the official reports

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

January 11, 2000 Hon. Francis T. Wasielewski,

Circuit Court Judge Presiding

APPEARANCES

RALPH EHLINGER, ALEX FLYNN, ROBERT SUTTON, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

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Q. Now, why would you have called her the morning of September 3rd without still having received some phone call from her? Why did you call her three times in a row the evening before and the morning of your deposition when you were about to testify against her saying that she was suborning your perjury because you were so reluctant to testify the way she wanted you to testify? Why did you place those three phone calls?

MR. HUSTON: Object to the form of the question, Your Honor. It is multiple, complex, argumentative.

MR. EHLINGER:
Q. Why did you place those three phone calls, Mr. Engel.
THE COURT: The witness may answer.
A. I have no recollection as to why. I don't know.
Q. What time did you meet Mr. Huston on September 2nd?
A. On the 2nd?
Q. Yeah. The day before the deposition.
A. I don't know.
Q. How long did you meet with him?
A. I don't know.
Q. Did you meet with him before or after you placed those two phone calls to Cindy Schultz?
A. I don't know.
Q. Did you tell them that you were trying to reach Cindy Schultz?
A. I don't believe so.
Q. Did he tell you that you should try to reach Cindy Schultz?
A. Yes.
Q. What did he say when he told you to try to reach Cindy Schultz?
A. He asked if I would make a call to her.
Q. Did he tell you what to tell her?
A. No.
Q. Did he tell you why you should make that call?
A. He told me something. I am unsure of exactly how he

put it.
Q. Tell me what ever you remember about how he put it?
A. He asked me if I would make a phone call to Cindy Schultz.
Q. Did he say anything at all about what you should do that phone call?
A. Talk with her about this.
Q. About what?
A. About me lying, all of these notes and stuff.
Q. Um humm. What did he tell you you should say about you lying, about all of these notes?
A. He didn't say that. He wasn't trying to put words in my mouth. He asked me if I would make a phone call to Cindy Schultz.
Q. Did he tell you to ask Cindy Schultz any questions?
A. No, it did not go that far.
Q. How far did it go?
A. I answered no.
Q. You answered no about what?
A. Making a phone call.
Q. Why did you answer no?
A. Because I didn't want to be a Linda Tripp.
Q. Why did you call her any way?
A. I have no idea. I am telling you that she called me many times. I called her. I responded back to her calls sometimes and sometimes I didn't.
Q. Was Mr. Huston asking you to be a Linda Tripp?
A. Pardon?
Q. Was Mr. Huston asking you to be a Linda Tripp?
A. No.
Q. Why did you say you refused to make the call because you didn't want to be Linda Tripp?
A. I am sorry. I guess I added that part.
Q. But you are under oath. You are not testifying recklessly here today, are you?
A. That is why I added it because that is the way I felt that is what I would be if I made the phone call.
Q. Something about what Mr. Huston asked you lead you to believe that he wanted you to be a Linda Tripp, is that right?

A. Correct.
Q. Linda Tripp, by the way, is someone who tape records conversations, correct?
A. Correct.
Q. And so something that Mr. Huston said to you lead you to believe that he wanted you to tape record a conversation with Cindy Schultz, correct?
A. Correct.
Q. Did he in fact say I would like you to call Cindy Schultz and tape record the conversation? Did he tell you that?
A. I don't know exactly how it was said.
Q. Come on now. You must. You don't know exactly. Answer my question, please. Did he tell you that he wanted you to tape record a phone conversation with Cindy Schultz?
A. I don't recall how he put it.
Q. I am not asking you how he put it. I am asking you if he asked you to tape record a phone conversation with Cindy Schultz?
A. That is the way I took it.
Q. And you decided that you would not because you were above that sort of thing, correct?
A. I decided not to do it.
Q. And yet you called Cindy Schultz anyway that day, correct?
A. I am unsure if that is the same day.
Q. Do you have a tape recorder?
A. Yes.
Q. You own a tape recorder?
A. Yes.
Q. What size is it?
A. Pocket size.
Q. You own others, too, don't you? Bigger ones, too, don't you?
A. I have a VCR.
Q. Have you ever tape recorded a phone conversation with anyone?
A. Yes.
Q. Under what circumstances do you tend to tape record

phone conversations?
A. I was having problems with my ex and my visitation.
Q. Is this a tape recording or tape recorder that clips on to the phone so that it is designed to actually do a good job of tape recording a phone conversation?
A. No, it does not clip on to a phone.
Q. Is it designed for use in recording phone conversations?
A. Yes, it was. I did own one like that yes.
Q. Okay. Did you ever tape record a phone conversation with Cindy Schultz?
A. No.
Q. You are sure of that?
A. Yes.
Q. Did you ever tape record a face to face conversation with Cindy Schultz?
A. No.
Q. Is this tape recorder of yours pocket sized, capable of being used in one of your pockets while you are talking to someone else?
A. Sure.
Q. Have you ever used it that way?
A. Yes.
Q. Did you ever use it that way with Cindy Schultz?
A. No.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)
) SS
COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on January 11, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 11th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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PROCEEDINGS

MADAM CLERK: Cynthia A. Schultz v. Charles Sykes, 98-CV-000724.

Appearances, please?

MR. SUTTON: Robert Sutton for the plaintiffs.

MR. EHLINGER: Ralph Ehlinger and Alex Flynn for the plaintiffs.

MR. HUSTON: James Huston and Paul Bargren for the defendants.

THE COURT: This matter is here this morning for argument and decision on the motion which has been filed by the defendants seeking a dismissal of this case on the grounds that the plaintiff, Cynthia Schultz, has committed perjury and has attempted to suborn the perjury of a non party witness. I have had a chance to review the briefs. The matter has been extensively briefed. I would like to give the parties an opportunity to add any further comments or have a chance to argue orally on some of this and then I will hopefully to be able to render a decision this morning. So I think since the defendants are the movants they ought to be first.
Mr. Huston?
MR. HUSTON: Thank you, Your Honor. Before the record closes I would like to offer into evidence Exhibit 48, the affidavit of Kathleen Hafner. Ms. Hafner is a representative of Amertech. The affidavit explains a couple of confusing entries on Exhibit 5, which are the records of Ms. Schultz. There are some entries which are doubled. The same phone call appears to appear twice on two consecutive lines. She says that appears to occur when one phone company hands the call off to another company. She also explained that an entry on that record which shows 00 time is a call that was not answered. I offer that into evidence. I believe there is

no objection.
MR. SUTTON: No objection.
THE COURT: It will be received.
MR. HUSTON: With that we rest. Your Honor, I will summarize evidence showing that first Clary --
MR. SUTTON: Wait. He rests, but don't we have a right to consider whether we want to put something in?
THE COURT: I had understood that offering of testimony has been completed. It was perhaps at a time when you were not here, but I thought that all testimony had been taken.
MR. SUTTON: Okay. All right. Never mind.
THE COURT: All testimony has been taken and evidence offered.
MR. SUTTON: All right. Sorry I interrupted. Before he argues there is one other thing I would like to address.
THE COURT: Go ahead.
MR. SUTTON: Okay. My research hasn't been I suppose absolutely exhaustive, but I still can't find any case in the country where this type of a hearing was ever held. Before I argue, I would like to know who has the burden of proof and what it is? I don't find any analogy, any case, anything that I can put my hand on to tell me that.
THE COURT: I would expect, consistent with our Anglo American system of juris prudence, that the movant generally, the party who has got the affirmative and is asking for something, generally has the burden of proof. This case wouldn't be any different. This situation with this motion wouldn't be any different.
MR. SUTTON: Maybe I misspoke. My question is not who has the burden of proof. My client is charged with a crime. In the courthouse on a criminal case it would be beyond a reasonable doubt.
THE COURT: I don't think suborning perjury is a crime. Suborning perjury I don't find in the criminal code. I have looked. That is not to say it is not there. If you have a statute, I would be eager for you to show it to me.
MR. SUTTON: I thought we were all operating under the assumption from the beginning of this that subornation of perjury was a crime. I am sure it is a Federal crime.

THE COURT: I know it has gotten lawyers in trouble.
MR. SUTTON: I know. I thought it was called witness tampering. I know it is a violation of the Federal law. Mr. Huston sits behind me totally silent. Do they think it is a crime or not?
MR. HUSTON: We do not here allege that it is a crime. We allege here that it reflects a contempt for the very foundation of a civilized judicial system. The Court is an institution for finding proof and it is underminded when a witness comes in and lies or when a witness attempts or succeeds in obtaining the lying, the false testimony of some other witness. The sanction for that is dismissal we believe pursuant to the cases that we have cited in our brief. I frankly don't think it matters whether suborning perjury is a crime for the proceeding here. Since this is a civil proceeding the burden is not beyond a reasonable doubt.
MR. SUTTON: What is it?
THE COURT: It's a civil burden. Which of the civil burdens would you say it would be, Mr. Huston, mere preponderance of the evidence or clear, satisfactory, convincing evidence?
MR. HUSTON: Your Honor, there is no Wisconsin case that answers that question. Some of the cases that we have read from regarding other jurisdictions provide that the burden is one of clear and convincing evidence. There are other cases that do not hold that. I don't think it matters, Your Honor. I think that perjury and the subornation of perjury here is proof of clear and convincing evidence.
THE COURT: I think that inasmuch as what we have here is something that is alleged to be in the nature of a fraud on the Court, that when you have a fraud you have the middle burden of proof applying generally. That is clear, satisfactory, convincing evidence. I think at the bottom of what is being alleged here is the claim that the plaintiff attempted a fraud on the Court. If we are talking about fraud, I think we are talking about a middle burden of proof. Certainly we are not talking about a criminal burden of proof here because there has been no criminal complaint filed. This court is not going to sentence anybody for anything here. That issue is not even before this court. We

are here in the context of a civil proceeding. I think with that we can proceed.
MR. SUTTON: Do the principles of summary judgment apply that all of the inferences are to be read in our favor?
THE COURT: Summary judgment methodology I don't think is particularly applicable here because here we had an evidentiary hearing. You never have an evidentiary hearing in summary judgment. Summary judgment is all on paper. In fact, the purpose of summary judgment is to avoid the Court having to get into the issue of credibility. I think credibility has been at the very bottom of this whole thing. So that I don't believe that summary judgment methodology would be applicable here.
MR. SUTTON: So you are just going to decide which of these people is telling the truth, is that it?
THE COURT: If you want it that way, Mr. Sutton. Those are your words.
MR. SUTTON: I demand a jury for my client under the Constitution of Wisconsin and the Constitution of the United States.
THE COURT: I don't think you are entitled to a jury on a motion to dismiss.
MR. SUTTON: I am not, but I am entitled to a jury to determine the credibility of witnesses.
THE COURT: And if you are entitled to one, you have waived it. You have never asked for a jury. You are asking for a jury now after the record has been closed.
MR. SUTTON: This is the first time you have told me that you were going to decide it based on whom you believe.
THE COURT: Well, if you read the filings with the Court, I think the issue raised by the motion was fairly clear. This was set down for a hearing several times. Originally it was supposed to be heard in December. It was put over to the 10th of this month. It was adjourned at the request of the plaintiff for good reason. The moving papers themselves have been on file since September. I don't think anybody can reasonably claim surprise as to what the issues were that are being raised here.
MR. SUTTON: I am not claiming surprise about that.
THE COURT: I think if you are going to demand a jury, it is

certainly not appropriate after the evidence is closed and the Court is about to hear arguments, summations from counsel. That is like standing up in a court after trial, all of the evidence is in, and the Court is asking for closing arguments from counsel and saying, Judge, we want a jury. I would say without hesitation, counsel, you have waived it. So that if you felt that this was a proceeding for which a jury was appropriate, it was incumbent upon the plaintiff to raise that issue earlier on and not at this time. If that were to be the case, then this court would have to retry this entire matter in front of a jury. I think it is fair to say that under the circumstances here, having had notice of what the issues were that were sought to be raised and knowing who was going to be called, we talked about that and I think there was adequate opportunity presented for the plaintiff to demand a jury if they timely sought a jury. Such demand was not made and the Court is going to deem that a jury has been waived.

MR. SUTTON: Okay. Thank you, Your Honor.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)
COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on January 21, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 10th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

February 29, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

ALEX FLYNN, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

*****

There are two other matters I wanted to put on the record in terms of objections. What has been woven into this record is that the burden of proof, the standard of proof that the Court found, the misconduct, has been clear and convincing. I don't want to reopen it, but I do want to object to lack of notice because we had no idea of what burden of proof we were working with. What burden of proof you are working with determines directly how a case is handled. If it is clear and convincing evidence, that affects the strategy of how you present the hearing. In a criminal case it is beyond a reasonable doubt.

THE COURT: You never asked.

MR. FLYNN: I believe we did ask.

THE COURT: You asked after the hearing.

MR. FLYNN: I think it was before the hearing, but I don't recall.

THE COURT: I don't recall the subject being raised and the question of a jury being raised until after the hearing. I will go by what the record is.

MR. FLYNN: I think that is what we should do. I don't recall either. I believe it was a conundrum at the outset.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)
COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on February 29, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 17th day of March, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

*****

COURT OF APPEALS OF WISCONSIN
DISTRICT I

CYNTHIA A. SCHULTZ and
THE ANIMAL LOBBY, INC.,

Petitioners,

vs.

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP, INC.,
and JOURNAL/SENTINEL, INC.,

Respondents.

PETITION FOR LEAVE TO APPEAL NONFINAL ORDERS OR IN THE ALTERNATIVE EXERCISE OF SUPERVISORY JURISDICTION FOR ISSUANCE OF A PREROGATIVE WRIT

NOW COME, Cynthia A. Schultz and The Animal Lobby, Inc., plaintiffs below and respectfully petition the Court of Appeals District I, pursuant to Secs. 809.50, 809.51 and 809.52, Wis. Stats. for leave to appeal from the nonfinal orders in Case No. 98-CV-000724 entered on February 21, 2000 and the decision rendered January 21, 2000 in the Circuit Court for Milwaukee County, Judge Francis Wasielewski, presiding, by which the Court granted the motion of the defendants to dismiss the complaint on its merits, denied the plaintiffs' motion for reconsideration and ordered that the plaintiffs be restrained from transferring any stock, real estate, securities, investment accounts or other accounts, savings accounts, retirement accounts, income from employment or other tangible or intangible assets to any other person or entity, whether as a gift or for consideration, except as provided therein or in the alternative exercise supervisory jurisdiction over the Court below by the issuance of a prerogative writ.

The petitioners also request temporary relief by a stay of further proceedings in the Court below.

The oral decision of the Court of January 21, 2000 is set forth in the transcript attached as Exhibit 2 to the Appendix served herewith. The non-final orders are attached as Exhibits 3, 4 and 5 to the Appendix served herewith.

The reasons supporting the petition are as follows:

STATEMENT OF THE ISSUES

I. In Wisconsin in a civil case of libel does a Circuit Court Judge have "inherent" power and authority, at a stage in the proceedings at which the defendants' motions for summary judgment have been denied and the jury trial of the action is scheduled to begin within a few weeks, to:

A. Entertain a motion of the defendants to dismiss the case with prejudice based upon accusations of a non-party witness - who is a nine time convicted criminal - that the plaintiff importuned him to give false testimony on her behalf.

B. Direct that an evidentiary hearing be held on the accusations, allow the defendants to conduct discovery depositions, preside at an evidentiary hearing for 5 days, act as the trier of fact at the conclusion of the hearing and find that the testimony of the plaintiff categorically denying the accusations is not worthy of belief, find that she was "guilty" of the attempted[28] subornation of perjury and dismiss the plaintiffs' complaint upon

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[28] The witness claimed that he never actually gave false testimony on behalf of the plaintiff. The Court stated as its ultimate finding. "...the Court has found there was an attempt to suborn perjury...." Appendix, Exhibit 1, page 31.

its merits.

C. Thereafter entertain a motion for imposition for attorneys' fees in the amount of $464,316.80 under Sec. 814.025.

D. Enjoin the plaintiffs, before entry of Judgment, from disposing of assets.

II. Assuming, dubitante, the Court correctly concluded that it had such "inherent" power and authority did the trial court err in the following respects:

A. Not advising the parties or rendering conclusions of law as to the proper standard that applies to such a motion, the burden of proof, or which burden of proof obtained; beyond a reasonable doubt, clear & convincing or pure preponderance.

B. Rejecting the standard summary judgment methodology which applies to civil actions in Wisconsin under Sec. 802.08, Wis. Stats.

C. Exhibiting bias and prejudice toward the plaintiff in cross-examination from the bench.

D. Enjoining the plaintiff - before entry of judgment - from disposing of any assets.

STATEMENT OF FACTS NECESSARY TO AN UNDERSTANDING OF THE ISSUES

On January 28, 1998 Cynthia Schultz filed suit against the defendants, Charles J. Sykes, Journal Broadcast Group, Inc. and Journal/Sentinel, Inc. Appendix, Exhibit 1, Entry 1-28-1998. The case progressed in the ordinary way through discovery with the defendants moving unsuccessfully for

summary judgment on some of the plaintiffs' claims. The Court calendared the case for trial before a jury on the surviving claims of the plaintiffs to commence on January 10, 2000.[29] Appendix, Exhibit 1, Entry 12-20-1999.

On September 30, 1999 the defendants filed a motion to dismiss the case alleging that the plaintiff had importuned a witness, one Clary Engel to give false testimony at the forthcoming trial. Appendix, Exhibit 1, Entry 9-30-1999 and Exhibit 6.

On November 1, 1999 the plaintiffs filed a Brief in Opposition to the motion asserting that there was no authority extant, statutory or case law for the defendants' motion and that it therefore should be denied. Appendix, Exhibit 1, Entry 11-1-1999 and Exhibit 7.

On November 11, 1999 the defendants filed a Reply Brief concluding that the Court should "...dismiss this case as a sanction for Ms. Schultz's misconduct, with or without any further hearing." (Emphasis supplied) Appendix, Exhibit 1, Entry 11-10-1999 and Exhibit 8.

Despite the defendants' apparent retraction of a request for a hearing, on November 30, 1999 in a telephone conference the Court set the matter for hearing on December 20, 1999. Appendix, Exhibit 1, Entry 11-30-1999. On December 20, 1999, at the same time the Court heard argument on and denied the defendants' Second Motion for Summary Judgment - see Appendix, Exhibit 1, Entry 12-20-1999 - the hearing was adjourned to January 10, 2000 and the jury trial was rescheduled to February 7, 2000.[30] The hearing on the defendants' motion took place between January 10, 2000 and

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[29] The defendants had pending a second motion for summary judgment which the Court denied on December 20, 1999. Appendix, Exhibit 1, Entry 12-20-1999.

[30] The defendants had filed a Motion to Adjourn in November, 1999 - Appendix, Exhibit 10 - to which the plaintiffs objected - Appendix, Exhibit 11.

January 13, 2000.

On January 21, 2000 the Court entertained argument and rendered its oral decision - Appendix, Exhibit 2 - finding that "...there was an attempt to suborn perjury" and concluding "...that the conduct of the plaintiff, Cynthia Schultz, in attempting to suborn perjury merits dismissal of hers complaint and the Court orders the complaint dismissed upon its merits" with "costs according to statute." Exhibit 2, pages 31-32.

Immediately, the defendants' attorney, James Huston, advised the Court as follows:

> "Your Honor, I will. I withdraw my request to submit findings of facts and conclusions of law because it would be gilding the lilly.
>
> I also would like the file at this moment a motion for attorney fees under Section 814.025 and ask Your Honor to schedule proceedings on that motion." Exhibit 2, page 32.

The Motion for Award of Attorneys' Fees under Sec. 814.025, Stats. is found at Appendix, Exhibit 9.

Thereafter on February 2, 2000 the plaintiff, Cynthia Schultz, filed, pro se, a Brief in Opposition to Defendants' Motion for Award of Attorneys' Fee and a Motion for Reconsideration. Appendix, Exhibit 1, Entry 2-02-2000.

A motion hearing was held on February 11, 2000 at which time the Court adjourned defendants' Motion for Fees to February 15, 2000 and enjoined the plaintiff "from making transfers of stock, personalty, interest in real estate or any other assets tangible and intangible until this matter is finally adjudicated." Appendix, Exhibit 1, Entry 1-11-2000.

At proceedings held on February 15, 2000 the Court orally denied the plaintiffs' Motion for Consideration and continued the injunction until further order of the Court. Appendix, Exhibit 1, Entry 2-15-2000.

A hearing is scheduled for February 29, 2000 at 9:00 A.M. on the defendants' motion as to attorneys' fees. Appendix, Exhibit 1, Entries 2-11-2000 and 2-15-2000. The orders proposed to be entered by the Court are set forth at Appendix, Exhibits 3, 4 and 5.

STATEMENT OF REASONS SUPPORTING PETITION FOR LEAVE TO APPEAL NONFINAL ORDERS OR IN THE ALTERNATIVE EXERCISE OF SUPERVISORY JURISDICTION TO ISSUE PREROGATIVE WRIT AND FOR TEMPORARY RELIEF

> "We are in bondage to the law in order that we may be free." Cicero, Pro Cluentio 53 quoted by Justice Myron Gordon in State ex rel White v. Simpson, 28 Wis.2d 590, 137 N.W.2d 391 (1965)."

> "Today's decision effects a vast expansion of the power of federal courts, unauthorized by Rule or statute. I have no doubt petitioner engaged in sanctionable conduct that warrants severe corrective measures. But our outrage at his conduct should not obscure the boundaries of settled legal categories...
> ...The Court has the presumption backwards. Inherent powers are the exception, not the rule and their assertion requires special justification in each case...." Mr. Justice Kennedy in dissent. Chambers v. Nasco, 501 U.S. 32, 111 S.Ct. at 2141 (1991).

It cannot be denied that the case at bar is a case of first impression. As the trial judge acknowledged there is no case in Wisconsin jurisprudence endorsing what transpired in the

Court below.

> "So that I agree with Mr. Sutton. I don't find any Wisconsin cases on this point. Fortunately, this is something that does not happen very often. This is the first time this Court has ever been involved in a motion of this type." Exhibit 2, page 29.

The fundamental legal impediment that jumps out from the factual narrative is the absolute disregard for any standard or - as Justice Kennedy puts it - "settled legal categories" which are in place in both the criminal and civil justice systems to prevent naked arbitrary exercise of judicial power.

Other than summarily dismissing summary judgment methodology out of hand:

> "This is not a paper case that can come before court as say a summary judgment would where the Court does not go behind any of the documents that are submitted. In fact, if there is a dispute or a material difference on an issue of fact for trial in a summary judgment, the Court cannot determine it. That automatically knocks the case out of summary judgment." Exhibit 2, pages 2-3.

The Court in its decision of January 21, 2000 makes no mention of what burden of proof or standard of law he is applying.

Of course, it is absolutely clear that had the methodology of summary judgment been applied the defendants' motion would have had to been denied. Clary Engel said the plaintiff importuned her to give false testimony. She said she did not. A material fact was in dispute. Her testimony must be accepted as true for purposes of the motion. All inferences are to be read in the light most favorable to her.

The motion must be denied. Kraemer Bros v. U.S. Fire Ins. Co., 89 Wis.2d 555 (1979); Grams v. Boss, 97 Wis.2d 332 (1980) and Transportation Ins. Co., Inc. v. Hunzinger Construction Co., 179 Wis.2d 281 (Ct. App. 1993).

So, since the plaintiff can't be "convicted" of "subornation of perjury" if the methodology of summary judgment is utilized some other standard must be substituted. What is it? Where in the statutes or the case law - state or federal, is it to be found?

It seems obvious that subornation of perjury is a crime although the Wisconsin Criminal Code does not specifically so declare. See Index to Criminal Code, Wisconsin Statutes; Cf. Sec. 946.31, Wis. Stats. Under our system of justice before a citizen can be convicted of a crime in a court of law she is entitled to all of the due process protections of both the Constitution of the United States and Wisconsin. She is presumed innocent and must be proven guilty beyond a reasonable doubt. The Court's opinion certainly can't be read to support a conclusion that he found her guilty beyond a reasonable doubt.

At the threshold the defendants' motion was without merit. The cases upon which the defendants relied were - and remain - so distinguishable on their facts as to be valueless. A first year law student reading Chambers v. Nasco, 501 U.S. 32 (1991) and Jones v. Clinton, 36 F.Supp. 1118 (E.D. Ark. 1999)[31] would realize that they involved serious proven indeed, uncontroverted and admitted misconduct - egregious misconduct - involving directly contemptuous actions by the miscreants. The proper analogies to the instant controversy is the Anita Hill - Clarence Thomas case or the Alger Hiss -

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[31] The plaintiff presented this argument to the trial court - analyzing all of the defendants' citations in the Brief in Opposition to the Motion. Appendix, Exhibit 7.

Whitaker Chambers case.[32]

The defendants have from the outset relied upon Johnson v. Allis Chalmers Corp., 162 Wis.2d 261, 470 N.W.2d 859 (1991) and the trial court reprised it as authority for his decision on January 21, 2000. That reliance is totally misplaced. To the contrary Johnson when read carefully and without disingenuous interpretation or expansion strikes the death blow to the motion. Justice Bablitch carefully and precisely sets the perimeters of "inherent power" of the judiciary. He does not in any way remotely suggest that a trial court in a civil action can embark on a investigation, hearing, trial and judgment of misconduct[33] merely on the affidavit of a non-party witness who claims one of the parties importuned him to give false testimony.[34] Justice Bablitch carefully crafts rules and standards to constrain the "inherent power" and he - as virtually every opinion in this area - cautions against its use - it is to be the exception, not the rule, and there must be compelling reasons. Most significantly Justice Bablitch notes that the "inherent power" must be exercised under proper standards:

> "A circuit court's decision to dismiss an action is discretionary, and will not be disturbed unless the party claiming to be aggrieved by the decision establishes that the trial court has abused its discretion. *Taylor v. State Highway Comm.*, 45 Wis.2d 490, 173 N.W.2d 707 (1970). A discretionary decision will be sustained if the circuit court has examined the relevant facts, applied a proper standard of law, and, using a

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[32] Which did result in a perjury conviction but in the appropriate forum - the criminal justice system.

[33] Act as a human polygraph, as it were.

[34] Of course the fact that the accuser is a nine time convicted criminal according to the upside down logic of the defendants and the court in the case at bar renders him more credible rather than less. Less is of course the law.

demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175 (1982)." (Emphasis supplied) 162 wis.2d 261 at 273..

The perimeters of the power to dismiss as a sanction are carefully set out as follows:

"Dismissal of an action is a particularly harsh sanction for a party's failure to obey discovery orders because it destroys the noncomplying party's property interest in his cause of action. Nevertheless, at both the state and federal levels, it is undisputed that under certain conditions the trial court must have authority to dismiss actions for a party's failure to comply with court orders. *See, e.g., National Hockey League*, 427 U.S. 639 (1976); *G-K Properties v. Redevelopment Agency, Etc.*, 577 F.2d 645 (1978); *Furrenes v. Ford Motor Co.*, 79 Wis.2d 260, 255 N.W.2d 511 (1977); *see generally* Annotation, *dismissal of State court Action for Failure or Refusal of Plaintiff to Obey Request or Order for Production of Documents or Other Objects*, 27 A.L.R.4th 61 (1984).

The latitude circuit courts in Wisconsin have to dismiss actions as a sanction is demonstrated by sec. 805.03, Stats., which permits dismissal whenever a party fails 'to obey any order of the court.' Although this language could be viewed as permitting dismissal for noncompliance with even trivial procedural orders, closer examination of the statute reveals that the court may only impose such orders 'as are just.' Furthermore, the Judicial Council Committee's Note - 1974 to the statute emphasizes that '[b]ecause of the harshness of the sanction, a dismissal under this section

> should be considered appropriate only in cases of egregious conduct by a claimant.' Our case law establishes that dismissal is improper, i.e. not 'just,' unless bad faith or egregious conduct can be shown on the part of the non-complying party. *See, e.g., Trispel*, 89 Wis.2d at 732; *Furrenes v. Ford Motor Co.*, 79 Wis.2d at 267-69." (Emphasis supplied) 162 Wis.2d 261 at 274-75.

The defendants in the case at bar are the most powerful newspaper in the State of Wisconsin and a radio talk show host who historically weighs in during his daily three plus hour radio program on the fitness or lack thereof of candidates for judicial office - federal and state. One cannot help but wonder if less powerful defendants would have succeeded on such a novel and unprecedented motion.

Not content with obtaining dismissal of the case and despite the Court having ruled that they were entitled only to statutory costs:

> "MADAM CLERK: Costs, Judge?
> THE COURT: Costs according to statute.
> MR. SUTTON. Is that it?
> THE COURT: That's it.
> I would ask, Mr. Huston, that you draw the appropriate order, submit it under the five day rule." Exhibit 2, page 32.

the defendants continued their march to destroy the plaintiff and, of course, thereby send a message to others who might have the audacity to sue them for defamation.[35] They ask the Court to award them attorneys' fees pursuant

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[35] **They destroy her reputation by publishing prominently the findings of the Court. See Appendix, Exhibit 14 - Affidavit of Robert E. Sutton. Of course, conveniently for the defendants, the newspaper article is privileged as a report of court proceedings.**

to Sec. 814.025, Wis. Stats. in the staggering amount of $464,316.80. A meritorious case that survived two motions for summary judgment is now to be held frivolous - again with no case law remotely in point.

Finally, adding insult to injury, the Court, now not requiring any formal motion papers or allowing submissions in opposition acting immediately upon the oral motion of the defendants before judgment has been entered and before deciding if or in what amount the plaintiffs are to become indebted to the defendants enjoins the plaintiffs from "transfer of any assets." Exhibit 4.

Have the due process and equal protection clauses of the respective Constitutions been flagrantly offended? See Gower v. Circuit Court for Marinette County, 154 Wis. 201, 452 N.W. 21 354 (1990); Best Disposal v. Milw. Sewerage, 128 Wis.2d 537 (1986); Spheeris Sporting Goods, Inc. v. Spheeris on Capitol, 157 Wis.2d 298, 459 N.W.2d 581 (Ct. App. 1990); The Fields Foundation, LTD v. Christensen, 114 Wis.2d 590, 337 N.W.2d 855 (Ct. App. 1983), State ex rel Sonneborn v. Sylvester, 26 wis.2d 43, 132 N.W.2d 249 (1965).

CONCLUSION

For the foregoing reasons the Court of Appeals should grant leave to appeal from the nonfinal orders in Case No. 98-CV-00724 or in the alternative exercise supervisory jurisdiction and issue the appropriate prerogative writ and grant temporary relief.

Dated this 22nd day of February, 2000.

s/Robert E. Sutton
Robert E. Sutton

2631 N. Downer Avenue
Milwaukee, WI 53211
(414) 961-0802
State Bar No. 1008459

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

March 2, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

ALEX FLYNN, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

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Q. Is there anything else you would add to those totals?
A. In addition we would ask the Court to award the fee that Mr. Mulligan will charge.
Q. And do you know what that fee is?
A. I do not. I do not. Mr. Mulligan I understand will testify about that when he testifies.
Q. And might there be some time for today too?
A. Time that we are spending today is not reflected on Exhibit 2.
Q. So Exhibit 2 is the claim through yesterday?
A. Yesterday.
Q. Why was all the work that you described in this document necessary?
A. It is my experience that victory often goes to the side that is the better prepared and particularly when one goes to a trial or a hearing. I did not want to lose this motion because we had overlooked something that needed to be done.
Q. Was this an important motion?
A. Very important.
Q. Important to the clients?
A. Yes.
Q. In what respects?
A. In the respect that we had attempted to win summary judgment and in this case had not succeeded as to two of the claims. There was a risk that those claims would go to a jury. Defamation lawyers don't like juries. There is the risk that messages will have been misquoted in the newspaper five years ago or something of that sort. It is the pattern nationwide that many defamation cases that go to juries wind up with large verdicts, most of which are reversed on appeal, but we didn't want to go that way. When Mr. Engel came forward with his report that Ms. Schultz had attempted to suborn his perjury, it presented us with a good opportunity to avoid a jury so it was very important.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

) SS

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on March 2, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 10th day of July, 2000, in Milwaukee, Wisconsin.

s/Yoland Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

*****

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

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YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

*****

A. That's correct.
Q. And how was it decided to adjourn his deposition?
MR. BARGREN: Objection, Your Honor. I guess I am missing something here. I don't understand how this is relevant to the issue of how much was charged in attorneys fees on that day or anything.
THE COURT: It sounds like we are getting into the merits and in some cases getting into things that you might not be able to explore. I was going to say maybe we were getting into some work product here. That could be necessarily the case when were talking about reasonableness of services and what was done here. You seem to be questioning more about strategy than you are about -- Where are you going?
MR. FLYNN: Where I am going is you can get across uptown just as cheaply in a bus as you can in a lear jet. Your Honor, they are coming in asking for $100,000 in fees. There were more reasonable, easier, much more cost effective manners that they could have gone about this.
THE COURT: That would be true if the plaintiff, when confronted with all of this, acknowledged it. Are you going to show somewhere in the record that she has acknowledged right along that this is what happened? Going on the basis of her testimony at the hearing, her testimony at the hearing was defiant. She said no. She denied it defiantly. She said her documents 15, 16 and 17 were merely her recording of answers given to her by Mr. Engel in response to questions that she asked. She denied that this was any kind of a script for perjured testimony. So in the face of that, your analogy, sure are there cheaper ways to do things? Yes, if you have got an adversary who admits what it is you are trying to prove. It is always easier to come in on a stipulation and get an order. You are implying that the plaintiff is willing to stipulate to this, but I don't see that willingness evidenced anywhere in this record.
MR. FLYNN: That by no means is what I am implying.

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)
) SS
COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on March 2, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 10th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

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STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

BRANCH 10

CYNTHIA A. SCHULTZ, et al.,
Plaintiffs,

vs. CASE NO. 98CV000724

CHARLES J. SYKES, et al.,
Defendants.

MOTION HEARING

August 21, 2000 HON. TIMOTHY G. DUGAN,
Circuit Court Judge,
Presiding

APPEARANCES
CYNTHIA A. SCHULTZ, Plaintiff, appeard Pro Se.

FOLEY & LARDNER, by
PAUL BARGREN, Attorney at Law,
Appeared on behalf of the Defendants.

DIANNE CALIVA, RPR, Official Court Reporter

COURT: that the plaintiff was suborning perjury is a tort, or the equivalent of a tort, and that although the Uniform Marital Property Act would presume that it's in the interest of the marriage, and therefore all the marital assets would be liable or subject to satisfaction of that debt, the Wisconsin Act modified the Uniform Marital Property Act in regard to tort claims and states that only the independent property of the tortfeasor and not the tortfeasor's spouse's interest in the marital property is subject to satisfaction. The legislative notes also conclude that a Marital Property Agreement would not prevent the tort, in the situation of the tort, the creditor, tort creditor being satisfied from the spouse's marital interest or in the interest marital property. So Mr. Bargren, you get to go first.

MR. BARGREN: Thank you. Well, I would not classify this as a tort. Again, I understand that we're probably in new waters here, but this is, this is in front of the court, and I don't think that's a tort, that causes injury to another person, another private person. This was a sanction levied by the court for Miss Schultz's conduct in the action. The court was in a sense the victim. I don't think the court can be the victim of a tort. This was a penalty or a fine. Really a sanction. And that's how Judge Wasielewski described it. He assessed the fees as a sanction to reflect what he saw was misconduct before the court. So for that reason I don't feel that it fell into an action as a tort, you know, it was a misconduct before the court. And I think those are -- we can call those three separate categories. And this would fall in the last category. An interesting area that I hadn't thought about until you just mentioned that analogy would be is there any case law on the issue of a criminal fine, and whether or not that can be satisfied against the entire marital estate or against only the criminal defendant's interests in marital estate.

MS. SCHULTZ: I just talked to Alex about that this week. No, it can't. It's got to be against the person if the person does something bad, okay. Like if I go out and rob --

THE COURT: $10,000 fine, imposed. Any chance you got a case on that?
MS. SCHULTZ: No. I mean, if I robbed a bank, and then they couldn't go and like take John and fine him for that. And the other thing I was thinking, it's like

is suborning perjury a tort.
MS. SCHULTZ: No, attempted to suborn
THE COURT: Let's -- I will, having at least read some of the materials of Judge Wasielewski, okay, whether it be attempted, or attempting to suborn perjury, is that a tort. And Mr. Bargren is stating it's not a tort. I assume you're arguing that if it occurred it was a tort.
MS. SCHULTZ: Well, yeah. I mean, I think they argue that attempting to suborn perjury is a fraud not a tort. Incidentally, fraud is a tort. It's a tort.
THE COURT: The only thing that I would possibly find controlling is if there was some case law saying that in a situation where someone committed a crime, and there was either an award of restitution or there was a fine itself, and the governmental body in that case for the fine would be attempting to collect the fine, and could you collect it against the entire marital estate, or would it only be the interest of, that criminal's interest in that case, in the marital estate.
MS. SCHULTZ: Well, in the case that I cited, that's another thing that I really don't

STATE OF WISCONSIN)

SS:

COUNTY OF MILWAUKEE)

I, DIANNE CALIVA, certify that I am the Official Court Reporter assigned to report the proceedings herein for the Circuit Court; that the foregoing is a true, correct, complete transcript of my original Stenographic notes taken on the proceedings had in the foregoing-entitled matter, of those portions which said transcript purports to represent.

s/Dianne Caliva
Dianne Caliva
Registered Professional Reporter

Dated at Milwaukee, Wisconsin, this 31st day of August, 2000.

IN THE CIRCUIT COURT OF MILWAUKEE COUNTY
STATE OF WISCONSIN

CYNTHIA A. SCHULTZ and
THE ANIMAL LOBBY, INC.,

Plaintiffs,

-vs- Case No. 98-CV-000724

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP, INC., and
JOURNAL SENTINEL, INC.,

Defendants.

Videotape examination of CLARY E. ENGEL, taken at the instance of the Defendants, under and pursuant to Section 804.05 of the Wisconsin Statutes, pursuant to Notice, before MARY RING, a Registered Professional Reporter and Notary Public in and for the State of Wisconsin, at Foley & Lardner, 777 East Wisconsin Avenue, Milwaukee, Wisconsin, on the 3rd day of September, 1999, commencing at 2:40 p.m. and concluding at 4:43 p.m.

A Yes.
Q Okay. Do you remember talking to me in that phone conversation we had before you came to my office?
A Before I came to your office?
Q You testified that you had a conversation with me about coming to my office, correct?
A Yes.
Q Do you remember anything else about that phone conversation?
A Just that you wanted to set up a date and we could

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meet anywhere, anytime.
Q Do you remember my asking you questions about the occasion that you spent at Ms. Schultz's office on the 17th of January?
A No.
Q You don't remember me asking you were you at Schultz's house on the 17th of January?
A No. You -- You may have asked me if I was going to be a witness possibly. I don't know. I -- I don't recall you asking me anything like that.
Q You don't remember me asking you if you were -- if it was true that you were at her house on the 17th of January? Is that your testimony under oath?
A Yes.
Q Okay.
A I remember specifically that you were trying to set up a date at anytime with me.
Q You said that it was because I wanted to have you give a deposition. That's what you testified, correct?
A Well --
Q Do you remember the word affidavit?
A In our conversation?
Q Yes. That I wanted you to sign an affidavit?
A I -- yeah, I think that you said you wanted to have

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me -- you wanted to talk to me so that I could sign an affidavit, yes. I believe that was --
Q Now, do you remember me reading proposed affidavits

to you paragraph by paragraph and asking you in every instance whether what I had just read was in fact true? Do you remember that?

A No.

Q You don't remember that at all?

A No.

Q That's your testimony under oath?

A It's under oath, yes.

Q Okay. Have you ever been charged with a crime of any sort?
A Yes.
Q What kind of crime?
A Burglary.
Q When was that?

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A I -- I really couldn't give you a date. It was -- I was waived into adult court.
Q So you were like around 17 years old?
A (Witness nods head.)
Q Is that right?
A Yes.
Q How old are you now?
A 31.
Q Okay. Have you ever been charged with any other crime?
A Possession of a firearm.
Q When was that?
A '91-ish.
Q Were you convicted of possession of a firearm?
A Yes.
Q And did you do any prison time for that?
A Yes.
Q How long?
A Approximately a year and a half.
Q When did you serve that time?
A Shortly after being convicted.
Q In 1991?
A I -- I -- I can't give a specific date. I'm not sure exactly when.
Q Were you convicted of the burglary charge?

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A I believe I pled on that.
Q You pled guilty?
A Yes.
Q Okay. And did you serve any time for that?
A Probation.
Q Okay. Have you been charged with any other crimes

other than the burglary and the firearm possession?
A When I was a kid, I got into a lot of trouble.
Q Anything since the 1991?
A Just the burglary.

HUSTON:
Q I just have a couple of clarifying questions, Mr. Engel. When Mr. Ehlinger was asking you about convictions, he asked you a question that read were you convicted of anything after the firearms violation in 1991, and I think you said just the burglary. Is that correct, were you convicted of a burglary after 1991?
A Oh, I'm -- I'm sorry. No. Well, I don't believe that the -- I -- I'm not sure on the date, but the -- after the firearms -- or the -- apparently

the firearm was stolen from a house, and they said that -- my attorney said that because I had contact with Gordie Doleshaw, that -- and a past record, that I would have to plead on the burglary, which I did receive probation for, versus going through trial and they'll bring up my past record and hold that against me, so I did plead on where the firearm came up, yes.

STATE OF WISCONSIN)

) SS:

COUNTY OF MILWAUKEE)

I, MARY RING, a Registered Professional Reporter and Notary Public in and for the State of Wisconsin, do hereby certify that the above videotape deposition of CLARY E. ENGEL was recorded by me on the 3rd day of September, 1999, and reduced to writing under my personal direction.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

In witness whereof I have hereunto set my hand and affixed my seal of offices at Milwaukee, Wisconsin, this 7th day of September, 1999.

s/Mary Ring
Notary Public

In and for the State of Wisconsin
My commission expires June 11, 2000.

STATE OF WISCONSIN : CIRCUIT COURT :
MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

PLAINTIFFS,

VS. CASE NO. 98-CV-000724

CHARLES J. SYKES, ET AL.,

DEFENDANTS.

January 10, 2000 Hon. Francis T. Wasielewski,
Circuit Court Judge Presiding

APPEARANCES

RALPH EHLINGER and ROBERT SUTTON, appeared on behalf of the Plaintiffs.

JAMES HUSTON and PAUL BARGREN, appeared on behalf of the Defendants.

YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

*****

have a battery in my back.
Q. Okay.
A. I don't know exactly the medical term. I don't know.
Q. And you are facing surgery again, is that true?
A. Yes.
Q. Is that scheduled?
A. Yes.
Q. For when?
A. For the 17th of this month.
Q. Next week?
A. Yes.
Q. Were you ever convicted of a crime, Mr. Engel?
A. Yes.
Q. How many times?
A. Five.
Q. Have you ever testified in court before today?
A. No.
Q. Do you know Cindy Schultz?
A. Yes.
Q. I would like to talk about how you met her. Did you once own a dog named Jaba?
A. Yes.
Q. What kind of dog was Jaba?
A. Siberian Husky mix.
Q. Was Jaba involved in an accident back in March of 1995?

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

) SS

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on January 10, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

Dated this 11th day of July, 2000, in Milwaukee, Wisconsin.

s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

*****

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY

CYNTHIA A. SCHULTZ, ET AL.,

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YOLANDA SHABAZZ, CPR.
OFFICIAL COURT REPORTER
BRANCH 17

*****

THE COURT: Mr. Engel, come forward, please. You are still under oath. Do you understand that?
THE WITNESS: Yes, sir.
Go ahead, Mr. Ehlinger.
MR. EHLINGER:
Q. Mr. Engel, before we had this somewhat lengthy recess here, I believe it was yesterday you were asked how many times you were convicted of a crime. I believe your answer was five. Was that your testimony yesterday?
A. Yes, it was.
Q. Now immediately prior to resuming this proceeding today, you had an opportunity to sit with Mr. Huston and Mr. Bargren, did you not?
A. Yes, I did.
Q. You went through some documentation I assume, is that correct?
A. Yes.
Q. Did you look through Exhibits 102 and 103, 104?
A. yes.
Q. Would you like to change your testimony on that?
A. Yes, I would.
Q. How many times were you convicted of a crime?
A. Nine.
Q. You are sure of that now?

Pet 436

REPORTER'S CERTIFICATE

STATE OF WISCONSIN)

) SS

COUNTY OF MILWAUKEE)

I, Yolanda F. Shabazz, Official Court Reporter hereby certify that as an Official Court Reporter for Milwaukee County, took in Stenograph the proceedings had before the Court in the aforementioned matter on January 11, 2000, and that the attached transcript is a true and correct copy of said shorthand notes.

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s/Yolanda Shabazz
Yolanda Shabazz, CPR.
Official Court Reporter

YFS/yfs
Branch 17

*****

Pet 437

SUPREME COURT
STATE OF WISCONSIN

CYNTHIA A. SCHULTZ,
Plaintiff-Appellant,
ANIMAL LOBBY, INC.,
Plaintiffs-Co-Appellants

v.

Appeal No. 00-0915

CHARLES J. SYKES,
JOURNAL BROADCAST GROUP,
and JOURNAL SENTINEL, INC.,
Defendants-Respondents

RESPONSE TO JOURNAL RESPONSE MOTION FOR JUSTICE ABRAHAMSON AND JUSTICE BRADLEY TO WITHDRAW AND MOTION TO RECONSIDER DENYING REVIEW AND MOTION TO VACATE THE APPELLATE COURT DECISION

The Journal asked this court to dispose of Ms. Schultz's motion for reconsideration on technicalities that are based on a distortion of the facts.

Ms. Schultz is simply not going to waste anymore time correcting the facts in the false pleadings of the defendants when the defendants appear to enjoy a special status in Wisconsin courts where their sanctionable conduct is condoned and disregarded.

I. THIS COURT HAS JURISDICTION.

This court knows that it has a constitutional grant of original jurisdiction and that it has supervisory authority over actions and proceedings in the trial court.

II. MS. SCHULTZ HAS NOT WAIVED THE ISSUES IN HER MOTION

The Journal argues that Ms. Schultz waited too long because she should have known about Judge Dykman's communications with the Journal Sentinel when their newspaper hit the stands on December 11, 2001.[36] Ms. Schultz agrees with Judge Schudson, in *Maguire v. Journal Sentinel, Inc.*, 232 Wis.2d 236, 265 605 N.W.2d 881, 896 (1999), and does not subscribe to the Journal Sentinel:

> "Lest anyone imagine that my conclusion might have been affected by Journal Sentinel's political power, I must disclose that I, like so many members of our community, believe that in the last twenty years or so the *Milwaukee Sentinel* and the once responsible and respected *Milwaukee Journal* steadily deteriorated and ultimately became a single, shameful newspaper-a newspaper that, indeed maliciously misrepresents facts, libels individuals, embarrasses the many good journalists on its staff, and seriously disserves our citizens." *Maguire at 896.*

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[36] Next the Journal will be suggesting that Ms. Schultz waived her prejudice claims in this court because she didn't tune in to the Sykes' show (an obvious violation of the cruel and unusual punishments clause of the 8th Amendment), Justice Sykes' husband, to get the news on which justices were going to withdraw from deciding the petition for review.

Nonetheless, the only people who knew that Judge Dykman was trying to get positive press from the Journal for his campaign for Wisconsin Supreme Court, while he was deciding this case, were Judge Dykman and the Journal Sentinel - and they didn't tell anyone. The fact that Wisconsin courts have bestowed a special status on to the Journal Sentinel does not mean that Judge Dykman should not have disclosed that he was communicating with the Journal Sentinel for the purpose of getting something of value from them. It simply means that this special status caused yet one more constitutional violation in the instant case - this time of the equal protection clause.

One doesn't have to wonder very long about what would have happened if Ms. Schultz would have called *any* judge, deciding this case, to interview him for an article for the Animal Lobby newsletter. Ms. Schultz can tell you what would have happened. Some Wisconsin judge, anxious to gain favor with the powerful Journal, would have used his "inherent powers" to conduct a trial, without a jury, to find Ms. Schultz guilty of some sort of fraud and to hang her and her entire family in his chambers.

The Journal argues that Ms. Schultz does not get "two kicks at (not a real) cat."[37] Cute. However, this is not the second kick at the <u>can</u>. It is the first. In actuality, it's no kick at all because Ms. Schultz has absolutely no doubt that, with the disparity in the treatment of litigants that this court has already shown in this case, this motion will do little more than supplement the record.

III. <u>THE PROOF OF THE PUDDING IS IN THE EATING.</u>

Ms. Schultz would like nothing better than to believe that her case against the Journal got a fair shake in

---

[37]The correct expression is "kick at the can" and not "kick at the cat."

Wisconsin's courts. However, the proof of the pudding is in the eating and the multiple distortions and manipulations in the appellate court opinion leave not much doubt that the court of appeals was motivated by something other than justice. They also leave not much doubt that the court of appeals had a reason to expect that their opinion would not be reviewed by this court.

In *United Mine Workers v. Bagwell*, 512 U.S. 821 (1994), the U. S. Supreme Court reasoned that the enormity of the sanctions, imposed under Judge McGlothlin's "inherent power," raised serious questions of propriety and biased adjudication.[38] In the instant case, add the numerous factual distortions and fabrications in the appellate court opinion to the enormous sanctions imposed under Judge Wasielewski's "inherent powers" and it is enough to prove that Ms. Schultz did not get a fair hearing in front of a fair tribunal in not only Judge Wasielewski's court but in the court of appeals.

Interestingly, the Journal does not dispute the fact that the court of appeals opinion is laden with distortions and fabrications of the record and of Ms. Schultz's appellate brief. They only argue that this court has no jurisdiction to consider them. They are wrong and this court has to consider these distortions if they are going to make any determination on whether the court of appeals did not act as a neutral and detached court.

Actually, this court need go no further than addressing how the following findings in the court of appeals opinion could possibly have happened *by accident:*

---

[38] Similar to the judicial conflicts in the instant case, the judge imposing the enormous fines in Bagwell was the son of a Virginia State legislator defeated by a union candidate in an election polarized by the union strike - a fact that was obviously not wasted on the U. S. Supreme Court.

A. 4TH DISTRICT COURT OF APPEALS OPINION:

¶40. In addition to Engel, the court also relied on the testimony of several other witnesses, including Barbara Manson and June Ellen Jones. Manson and Jones both had the Setters in their custody for a time before the dogs were returned to their owner. Although Manson and Jones did not provide testimony that Schultz had attempted to suborn perjury from Engel, the court concluded that they corroborated Engel and undermined Schultz's testimony because both of their testimonies conflicted with Schultz and because Manson testified consistently with Engel that Schultz told her that the dogs were in her custody. We agree with the circuit court that both Manson and Jones tend to discredit key parts of Schultz's version of events.

¶43. In deciding that Schultz was not credible, the circuit court emphasized that while Schultz had the greatest incentive to lie, there was no apparent motive for Engel, Manson, and Jones to falsely contradict Schultz's testimony. The appellants too have failed to provide possible reasons for why these individuals would want to perjure themselves for the sake of hurting Schultz.[FN1] In her brief Schultz claims that Manson and Jones did not contradict her testimony and that "only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston [one of the Journal's attorneys], Ms. Rowe [one of Schultz's former attorneys], Ms. Majerus, Ms. Volk [a friend of Schultz who was involved in the dognapping], Ms. Kiedrowicz [Schultz's sister], and Mr. Ehlinger [one of Schultz's current attorneys] were all lying could Mr. Engel's version of events be true." Schultz, however, provides no citation to the record to support this assertion, nor does she explain how each of these individuals contradicted Engel's testimony. Rather, Schultz admitted under oath

that her testimony conflicted with that of Engel, Manson, Jones, and also Detective Staudacher, one of the officers who had investigated the dognapping case.

[FN1]During the hearing, Schultz's attorney questioned Engel about a decision by Schultz to neuter Engel's dog without his permission, and suggested that this would have created hostility toward Schultz. Engel, however, denied that he was upset about it, and Schultz and ALI have not asserted this as a possible explanation on appeal.

B. MS. SCHULTZ'S COURT OF APPEALS BRIEF:

I. RESPONDENTS' ARGUMENTS FAIL TO SHOW THAT THE PROCESS WAS AUTHORIZED BY LAW AND WAS CONSTITUTIONAL. THEY ERRONEOUSLY ARGUE THAT OTHER WITNESSES CORROBORATED MR. ENGEL'S STORY ABOUT ATTEMPTED SUBORNATION OF PERJURY.

.....

Respondents' argument concentrates on sufficiency of the evidence. Their argument is that Clary Engel's testimony that Ms. Schultz asked him to steal and, after he refused her, that she told him she stole the Whitefish Bay dogs was corroborated by June Ellen Jones, Barbara Manson, U.S. Attorney Joe Wall, Ms. Schultz's sister, Ms. Schultz's attorneys, and Ms. Schultz's own notes and affidavit. The record, however, demonstrates that no one corroborated Clary Engel.

Before discussing this non-corroboration, it is important to note that the bench trial, within this defamation case, was about whether or not Ms. Schultz was involved in a dognapping that was the subject of a

dismissed misdemeanor party to a dognapping case and that had nothing to do with the claims in this case. Thus, the entire process was the result of a smokescreen sent up, by the defendants, to avoid a jury trial on defamation claims in which Sykes and the Journal had falsely reported that Ms. Schultz and the Animal Lobby, Inc. had a dog killed and carved up to get publicity and to prove a political point. Thus, although the following discussion addresses the dognapping issue, it is only to prevent the respondents' accusations from going unanswered. It is not a concession that the dognapping smokescreen was even remotely material to the claims that were scheduled to go to a jury.

Respondents say at p. 11 that "Ms. Schultz admitted that only if Mr. Engel, Ms. Manson, Ms. Jones were all lying could her version of events be true." Ms. Schultz admitted no such thing. In fact, the record shows that only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston, Ms. Rowe, Ms. Majerus, Ms. Volke, Ms. Kiedrowicz and Mr. Ehlinger were all lying could Mr. Engel's version of events be true. For this preposterous statement on p. 11, defendants cite to portions of Ms. Schultz's cross examination. However, the record shows that, in that cross examination, Ms. Schultz was forced by the court to repeatedly respond to fabricated hypothetical questions [B-AP:1157]. Ms. Schultz objected to certain questions because their assumption was not true. The court intervened and told her she should not argue with the premise of the question [B-AP:1157]. Regarding the non-corroboration of Engel, June Ellen Jones and Barbara Manson never corroborated any of Mr. Engel's testimony that Ms. Schultz stole the dogs or that she even told them that she stole the dogs. The testimony of Ms. Jones and Ms. Manson that they had phone conversations with Ms. Schultz about the dogs does not corroborate Engel and does not prove that Ms. Schultz stole the dogs. Ms. Schultz has always admitted that she knew the whereabouts of the dogs. Judge Foley recognized this during the first summary judgment hearing in this case in September 1998: "She also acknowledged being involved

in the post-theft relating of the dogs, if you will." [B-AP:1167-68]. Additionally, Ms. Jones repeatedly testified that Ms. Schultz told her she did not steal the dogs [B:AP:1075]. Respondents cite June Ellen Jones' statement in a police report as corroborating evidence [D632]. However, Jones testified that what was in the report was "not what happened" and that the affidavit in this case, that defendants traveled to Illinois to get her to sign, was not accurate [B:AP:1079].

Neither did U.S. Attorney Joe Wall corroborate Mr. Engel. He simply repeated what Engel allegedly told him. In fact, Mr. Wall testified that he could not vouch for the truthfulness of Mr. Engel. [B-AP:1021]. Mr. Wall also testified that Clary Engel never told him that Engel tried to get money from the Journal and Sykes on the evening that Engel called him before his first deposition [B-AP:1023]. Engel first testified that he called Wall and later even denied making the call to Wall [B-AP:1014]. Even the trial court, in its decision, said it was giving less weight to Mr. Wall's testimony. The court called it "dependent corroboration" [A-AP:112] because it was dependent upon what Engel told Wall.

At page 24, respondents say, "No one supported Ms. Schultz's version of the events, not even her own sister." Respondents could give no cite for this allusion because Ms. Schultz's sister was not a witness at the dognapping bench trial that was substituted for the defamation jury trial. Respondents, however, even try to use that against Ms. Schultz. On p. 27, they call her sister a "missing witness" in the illegal hearing. Yet, respondents themselves served Ms. Kiedrowicz with a subpoena [B-AP:1161] only to withdraw it when a review of her deposition revealed that her testimony supported Ms. Schultz's version of the events [B-AP:1024].

Respondents imply, at p. 28, that Ms. Schultz attorneys corroborated Mr. Engel. In fact, her attorneys corroborated Ms. Schultz's statements that Ms. Schultz was

a very active participant in her own defense and that she drew up a list of questions and answers for all of her proposed witnesses and that her attorneys had those outlines along with the outline of Mr. Engel's testimony [B-AP:1059, B-AP:1073]. Furthermore, the court, in its' decision specifically said that it believed Attorney Ehlinger's affidavit testimony [A-AP:116-17] that Mr. Engel had called him to give him a statement [B-AP:1001] even though Mr. Engel testified that he never gave Mr. Ehlinger a statement [A-AP:540]. Attorney Lisa Rowe had a similar situation where she testified that Engel spoke to her and gave her a statement [B:AP:1055]. Engel testified that he never spoke to Lisa Rowe [B-AP:1062B].

In discussing the alleged "scripts," respondents ignore that they were drawn up in 1997, prior to the filing of this action, for an entirely different case over which the trial court, in this case, had no jurisdiction. Moreover, at pg. 7, the defendants say that Ms. Schultz had "included Mr. Engel's false alibi in her plans for this lawsuit." Plaintiff's preliminary witness list, that was not filed with the court and only given to the defendants [B-AP:1082], shows that Mr. Engel was not listed as being able to give any testimony about the dognapping. He was listed as a possible witness who claimed he heard the Sykes's broadcast about Ms. Schultz killing and carving up a dog [B-AP:1087]. This witness list was put together five months before Engel claimed that he was first asked him to give false testimony about hearing the Sykes's broadcast.

Respondents claim, at p. 6, that Ms. Schultz's summary judgment affidavit falsely claims that she played no role in connection with the dogs and helping to place them, so that her affidavit contradicts Ms. Jones and Ms. Manson and therefore corroborates Mr. Engel. This is simply not true. Ms. Schultz affidavit clearly states her involvement:

> My involvement with the Smith dog incident after the dogs were taken was, as I

> truthfully reported to the police, restricted to receiving an anonymous call from an individual who told me he had taken the dogs, telephoning Phyllis Wexler to tell her that I had heard the dogs had been taken, speaking to the police, videotaping the premises from which the dogs had been taken on the following day with the knowledge and at the request of the Whitefish Bay Police Department, and returning and taking phone calls from individuals who had been asked to attempt to locate individuals who would care for the animals. [D:651]

Thus, respondents misrepresented Ms. Schultz's position when they said at p. 3, without any cite, that she "showed every sign of wanting to exculpate herself."

Not only do defendants falsely argue that Mr. Engel's testimony was corroborated, they also whitewash Mr. Engel's testimony. They say, at p. 25, that he was "confused about a deposition preparation session" when in fact he repeatedly lied, was evasive and "feigned confusion" about his contacts with defendants' attorneys [A-AP:413,491,498,499]. Respondents argued that appellants attempted to make the five hour prep session, between Mr. Engel and three lawyers at Foley and Lardner, sound sinister by calling it a "mock trial." However, it was the defendants, themselves, who called it a "mock trial" in their bills submitted to the court when they asked to be paid $5,950.50 for that session [B-AP:990]. It was also the defendants who chose not correct Mr. Engel's deceptive and false testimony thus keeping his mock trial and other meetings secret from the court until after the court dismissed the case. Respondents imply at p. 26 that there was no truth to appellants' statement that Mr. Engel tried to get money from the defendants. Yet, after telephone records divulged the calls to the defendants and proved Mr. Engel's deposition testimony to be false, Mr.

Engel himself finally admitted that he asked the Journal and Sykes for money [A-AP:402]. This is entirely consistent with Ms. Schultz's testimony that Engel had asked her for money. That testimony was corroborated with telephone records showing Mr. Engel's calls to Ms. Schultz right before calling Sykes and the Journal and again on the day before and of his deposition [A-AP:420].

Ironically, the court itself showed that Mr. Engel could not be believed. The court specifically said it could not find that Ms. Schultz was guilty of the dognapping. "The suborned perjury here does not in the Court's view show that the plaintiff committed the dognapping. The guilt with respect to the dognapping does not in the Court's view necessarily follow from the fact of the attempted subornation of perjury." [B-AP:1013].

C. **MS. SCHULTZ'S COURT OF APPEALS APPENDIX INDEX:**

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It is evident that Ms. Schultz did provide citations to the record to support her assertion that only if the

witnesses, listed in the court of appeal opinion, were all lying could Mr. Engel's version of events be true. It is also obvious that citations were not only provided in Ms. Schultz's brief but that she took the extra step of including the testimony, supporting her contentions, in her appendix. To this point, the appellate court opinion, saying the opposite, is dishonest *at best* and malicious at worst.

However, the court of appeals, didn't stop there and, without citing to the record, said: "Rather, Schultz admitted under oath that her testimony conflicted with Engel, Manson, Jones and also Detective Staudacher, one of the officers who had investigated the dognapping case."

Ms. Schultz's response brief clearly pointed out the opposite:

> Respondents say at p. 11 that "Ms. Schultz admitted that only if Mr. Engel, Ms. Manson, Ms. Jones were all lying could her version of events be true." Ms. Schultz admitted no such thing. In fact, the record shows that only if Ms. Schultz, Ms. Jones, Mr. Wall, Mr. Huston, Ms. Rowe, Ms. Majerus, Ms. Volke, Ms. Kiedrowicz and Mr. Ehlinger were all lying could Mr. Engel's version of events be true. For this preposterous statement on p. 11, defendants cite to portions of Ms. Schultz's cross examination. However, the record shows that, in that cross examination, Ms. Schultz was forced by the court to repeatedly respond to fabricated hypothetical questions [B-AP:1157]. Ms. Schultz objected to certain questions because their assumption was not true. The court intervened and told her she should not argue with the premise of the question [B-AP:1157].

The above makes it obvious that it was maliciousness and not simple dishonesty that drove the court of appeals to so distort the record.

While the above fabrication gave way to permit the court of appeals to conclude that Judge Wasielewski did not error in his assessment of credibility, the following fabrication was of a much more egregious nature in that it led to a serious 5th and 14th Amendment constitutional violation by the court of appeals:

D. 4TH DISTRICT COURT OF APPEALS OPINION:

¶56. The Journal also argues, however, that whatever claims ALI might have had were lost because it failed to first demand a retraction of the allegedly libelous statements as required by Wis. Stat. § 895.05(2)[FN11] before filing its lawsuit. ALI responds that the statute did not require it to request a retraction for the statements made by Sykes on his radio show and that all three respondents are barred from using ALI's failure to request a retraction as a defense because they failed to raise this issue in the circuit court.

¶57. We agree with ALI that it was not required to request a retraction from Sykes because his statements were not made in print. See It's in the *Cards, Inc. v. Fuschetto*, 193 Wis. 2d 429, 436, 535 N.W.2d 11 (Ct. App. 1995) (holding that notice requirement of Wis. Stat. § 895.05(2) applies only to libel made in print). We do not agree, however, that we are precluded from considering ALI's failure to make the request with respect to the Journal Sentinel because the Journal Sentinel failed to raise the issue in the circuit court. Failure to request a retraction under Wis. Stat. § 895.05(2) is not an affirmative defense. Rather, the notice requirement of the statute is a condition precedent to the

existence of a cause of action for libel where the statute applies, and a circuit court is not competent to hear the claim until the condition is met. Cf. *Elm Park Iowa, Inc. v. Denniston*, 92 Wis. 2d 723, 728-29, 286 N.W.2d 5 (Ct. App. 1979) ("[N]o civil action for damages can be brought or maintained unless the condition precedent of required notice is given."); see also *Hucko v. Jos. Schlitz Brewing Co.*, 100 Wis. 2d 372, 380-81, 302 N.W.2d 68 (Ct. App. 1981) (holding that failure to request retraction under § 895.05(2) requires that claim be dismissed). The Journal denied in its answer that ALI had demanded a retraction, and that was all it was required to do. Therefore, because ALI never demanded a retraction from the Journal Sentinel, its claim against the Journal Sentinel must be dismissed.

[FN11] Wisconsin Stat. § 895.05(2) provides: Before any civil action shall be commenced on account of any libelous publication in any newspaper, magazine or periodical, the libeled person shall first give those alleged to be responsible or liable for the publication a reasonable opportunity to correct the libelous matter. Such opportunity shall be given by notice in writing specifying the article and the statements therein which are claimed to be false and defamatory and a statement of what are claimed to be the true facts. The notice may also state the sources, if any, from which the true facts may be ascertained with definiteness and certainty. The first issue published after the expiration of one week from the receipt of such notice shall be within a reasonable time for correction. To the extent that the true facts are, with reasonable diligence, ascertainable with definiteness and certainty, only a retraction shall constitute a correction; otherwise the publication of the libeled person's statement of the true facts, or so much thereof as shall not be libelous of another, scurrilous, or otherwise improper for publication, published as the libeled

person's statement, shall constitute a correction within the meaning of this section. A correction, timely published, without comment, in a position and type as prominent as the alleged libel, shall constitute a defense against the recovery of any damages except actual damages, as well as being competent and material in mitigation of actual damages to the extent the correction published does so mitigate them.

E. **MS. SCHULTZ'S COURT OF APPEALS BRIEF:**

"Then, after reporting every possible item of damaging innuendo against Ms. Schultz and the Animal Lobby, Inc. for months, and after reporting that she had been convicted of a felony, and after refusing repeated requests for retractions, the defendants were absolutely silent when the misdemeanor charges were dropped in the dognapping case. If the defamations had been in any way germane to any public controversy, surely the dismissal would have been germane."

"On March 3, 1996, Ms. Schultz sent Journal Sentinel a letter to the editor pointing out the inaccuracies in their March 3rd story [A-AP:320]. On March 22, she sent a letter to the editor requesting a retraction for statements made in their articles describing her as a "vigilante animal activist" who was suspected in the abduction of two dogs because she was concerned that they "might have been mistreated by being kept outdoors." [A-AP:321-22]. The Journal Sentinel ignored her requests and, on April 17, published another false story [A:AP:295]. On April 17, Ms. Schultz sent the Journal Sentinel a letter requesting a

retraction for the falsities in that story [A-AP:323-24]. Again, her request was ignored. Before filing this defamation lawsuit, Ms. Schultz sent another formal statutory request for retraction[A-AP:332-37]. No retraction was printed."

F. **RELEVANT PARTS OF INDEX OF JOINT APPELLATE COURT APPENDIX:**

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18. Letters from Plaintiff to Journal Sentinel concerning retraction of libel [R.14:Ex.A] 320

19. Letters from Plaintiff to and from WTMJ concerning preserving tapes of the Sykes broadcasts [R.14:Ex.B] 325

20. Letters from Plaintiff to and from FCC [R:14:Ex.B] 328

21. Formal statutory request for retraction to Journal Sentinel prior to this lawsuit [R.14:Ex.A] 332

.....

It doesn't take a rocket scientist to conclude that the Animal Lobby, Inc. notified the Journal Sentinel of the libels and gave them the opportunity to correct them. Yet, the court of appeals, relying on an erroneous footnote in the Journal appellate court response brief, leapt at the opportunity to get rid of the Animal Lobby, along with Ms. Schultz, by making an erroneous finding of fact and then dismissing the Animal Lobby's claim against the Journal Sentinel. This was not only a distortion of the record, it was an obvious violation of Art. VII, sec. 5(3) Wis. Const. and the 14th and 5th Amendments of the United States Constitution. This court knows it. This court said it. *Wurtz v. Fleischman, 97 Wis.2d 100, 107 (1980)*.

IV. IF IT ISN'T BIAS...WHAT IS IT?

If the appellate court opinion, in this case, wasn't driven by bias, how does this court explain the numerous distortions and manipulations of the record and of the facts in this case. The court of appeals found that witnesses did not corroborate Ms. Schultz's testimony. They did. They found that Ms. Schultz "admitted under oath" that her testimony "conflicted" with certain witnesses. She didn't. They found that Clary Engel had testified truthfully about his convictions. He didn't. They found that Judge Wasielewski conducted a lesser sanctions analysis. He didn't. They found that Judge Wasielewski found that Engel was an important witness. He found the opposite. They found that Ms. Schultz did not contest the "reasonableness" of the fees. She did. They found that Ms. Schultz testified that she could not testify to the information contained in an expert report. She didn't. They found that the Animal Lobby, Inc. did not send out the statutory notice to the Journal Sentinel. They did.

So, if it isn't bias, what is it? The appellate court opinion contained over *twelve* distortions and out right fabrications of the record and of the appellant's pleadings. This does not include the gross distortions of the cases upon not only which the court of appeals relied but upon which Ms. Schultz relied. If prejudice was not the basis for these fabrications, what was?

This court was aware of the multiple constitutional violations that occurred in both Judge Wasielewski's court and in the appellate court. This court was aware of the numerous factual distortions in the appellate court's opinion. This case and the garnishment case contained matters of first impression. Yet, this court permitted the court of appeals published opinion to stand. If it wasn't because the Journal enjoys a special status with this court, what was it?

V. GOBLINS BEHIND EVERY TREE

The Journal suggests that Ms. Schultz's claims are "goblins" that she sees hiding behind every tree. Being that goblins are ugly and malicious little spirits, perhaps Ms. Schultz is seeing goblins. However, these goblins are not hiding behind the trees anymore and Ms. Schultz is now well aware of what went on behind those trees when they *were* hiding there.

As a matter of fact, Ms. Schultz has a goblin who can come out from behind his tree right now. We all know who Clary Engel is in this case. He's the five time convicted felon who Judge Wasielewski found "credible" after he tried to get money from the Journal, Sykes and Ms. Schultz. The appeals court viewed "as troubling Engel's request for compensation from the Journal Sentinel and Sykes" but, nevertheless, found "reasonable" Engel's explanation that he did not tell anyone about it, except the Journal and Sykes of course, because he "didn't think he had done anything wrong" and because he "believed that journalists provided compensation for news stories." Well, Judge Wasielewski decided that Engel had turned over a new leaf and that his criminal past, sealed and hidden away by Judge Wasielewski in this case, was all part of a younger and less wise Clary Engel. However, on June 3, 2000, before the ink was dry on Judge Wasielewski's order for judgment, Mr. Engel got himself into a bit of a jam again. While driving with a suspended license,[39] Engel smacked into an elderly lady causing damage to her car. The police were called and the new and improved Engel lied to the police by giving them a phoney address. Imagine American Family Insurance Company's surprise

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[39] Engel lied, in his testimony in this case, by testifying that he never had a driver's license when, in fact, he did have a license that was suspended. [198:78] Judge Wasielewski knew that Engel was driving without a license but didn't want to hear about it because it was a prior bad act. It's too bad too because he could have saved an elderly lady, on a fixed income, a lot of grief and some money.

when they couldn't find Engel to pay for the damage. *Talk about goblins.* Well, the invisible Engel eluded service but the persistent American Family published and got a $982.66 judgment against the elusive Engel on June 22, 2001, *(01SC012227)*.

The judgment sat uncollected until December 4, 2001- the very last day that the court of appeals had to reconsider its opinion in this case. On that day, one of those goblins, who persist on popping out from behind the trees in this case, delivered $900.00 in *cash* to American Family's lawyer to pay off Clary Engel's judgment. Interestingly, the cash delivery of $900.00 was arranged by a $240.00 an hour Journal lawyer. Now, the Journal could accuse Ms. Schultz just seeing another goblin here but, lucky for her, the lawyer for American Family Insurance memorialized the arrangements made with the Journal lawyer by writing them down in the following notes:

Left message 12-4-01 9:23 A.M.
Attorney Jim Houston /Foley & Lardner
– has $900 in cash –
– 297-5555 –
12-4-01 9:45
returned call
Defendant's attorney to be here forthwith [ex:A]

Now what in the world are we going to do with this? Judge Wasielewski based all of his decisions on whether "we believe Clary Engel or do we believe Cynthia Schultz"[A:AP:108] and, just when Judge Wasielewski went through all of the trouble to seal Engel's public criminal records because they were "damaging" to him, there Engel was...lying to the cops again.

And this pesky money thing that keeps cropping up in this case? The court of appeals thought it was a little "troubling" but perfectly "reasonable" for Engel to lie in a deposition to hide the fact that he tried to get money from

the Journal because "he thought he was doing nothing wrong."

Perhaps this court would have found that it was more than just a little "troubling" if the $240.00 an hour Journal lawyer, when he was briefing to this court, would have told this court that he had arranged to have $900.00 in *cash* delivered to pay off one of Engel's debts after the Journal permitted Engel to lie in his deposition to conceal the fact that he asked the Journal and Sykes for money in the first place. Then again, with the special status, that the Journal appears to enjoy, there may have been no effect at all on this court's decision to not review Ms. Schultz's petition.

Well, as Judge Wasielewski said during one of the many times that he was oppressing Ms. Schultz and persecuting her lawyers with his constant rude comments from the bench....."*Oh What A Tangled Web We Weave.*" [A:AP:548-57]

CONCLUSION

In Ms. Schultz's original motion, she asked that this court remand this case to an independent appellate panel of judges for a review. It has, however, become evident that District IV's dishonest opinion has so poisoned the waters that there is no such thing as an unbiased and "independent" panel of appellate judges for this case in Wisconsin.

There is, therefore, only one panel that should be deciding this case and that panel is a jury. This court, after Justice Abrahamson and Justice Bradley withdraw, should remand this case to the trial court for a jury trial.

Submitted,

s/Cynthia A. Schultz
Cynthia A. Schultz, *pro se*

Pet 460

Cynthia A. Schultz
11548 River Road
Mequon, Wisconsin 53092

L/M 12-4-01 9:23

Atty. Jim Houston/ Foley & Lardner

– has $900 in cash –
– 297-5555 –

12-4-01 9:45
ret'd call

D atty to be here
f/w

Exhibit A
Response Brief